No. 555

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In the

United States Court of Appeals

For the Seventh Circuit

No. 11922

HERLIHY MID-CONTINENT COMPANY,
Plaintiff Appellee,
vs.
NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Defendant Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Honorable
Luther M. Swygert,
Trial Judge.

APPENDIX TO APPELLANT'S BRIEF

EDWIN H. FRIEDRICH,
Hammond Bldg.,
Hammond, Indiana,
R. STANLEY ANDERSON,
Yale Bldg.,
Hammond, Indiana,
EDMUND A. SCHROER,
Hammond Bldg.,
Hammond, Indiana,
Attorneys for Defendant Appellant.

LAWYER, FRIEDRICH, PETRIE & TWEEDLE,
Of Counsel.

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1 UNITED STATES DISTRICT COURT,

Northern District of Indiana,

Hammond Division.

Before the Honorable Luther M. Swygert, Judge.

Herlihy Mid-Continent Company, an Illinois corporation, *Plaintiff-appellee,* *vs.* Northern Indiana Public Service Company, an Indiana corporation, *Defendant-appellant.*	Hammond Civil 1446

STATEMENT UNDER RULE 12(c) OF THE RULES OF THE U. S. COURT OF APPEALS.

December 6, 1952. Complaint filed. Summons issued and forwarded to Marshal.

May 2, 1955. Defendant filed answer, with proof of service attached.

February 20, 1956. Trial by court, without the intervention of a jury commenced but not concluded.

February 21, 1956. Trial resumed, but not concluded.

February 22, 1956. Trial resumed but not concluded.

March 9, 1956. Trial resumed. Cause concluded and submitted and taken under advisement.

August 17, 1956. Findings of Fact, Conclusions of Law and Judgment entered (Luther M. Swygert: Judge), Judgment entered for plaintiff Herlihy Mid-Continent Co. against defendant Northern Indiana Public Service Co. in the sum of $31,529.55, plus costs.

August 24, 1956. Defendant filed motion for new trial.

September 25, 1956. Order entered denying motion for

new trial. Judgment entered in accordance with the findings of the court entered August 17, 1956.

October 19, 1956. Defendant Northern Indiana Public Service Company filed notice of appeal.

3 IN THE UNITED STATES DISTRICT COURT.

(Caption—1446)

COMPLAINT.

(Filed Dec. 6, 1952. Kenneth Lackey, Clerk.)

Plaintiff, Herlihy Mid-Continent Company, an Illinois corporation, complains against the defendant, Northern Indiana Public Service Company, an Indiana corporation, as follows:

Count I.

1. Plaintiff is a citizen of the State of Illinois and defendant is a corporation incorporated under the laws of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2. On or about October 13, 1948, the plaintiff, as an independent contractor, at Chicago, Illinois, entered into a written agreement with the defendant, said agreement being identified as Contract K-814, Job 1790, by the terms of which plaintiff was to construct, perform and complete, and furnish all labor, materials, construction equipment, expendable tools and construction supplies required for the Store Room, Drive House Office, Coal Handlers' Locker Rooms, and Elevator Shaft in existing Boiler Room,

4 in connection with the 1948 extension to defendant's Michigan City Generating Station, located on Lake Michigan, West of the Harbor at Michigan City, Indiana. A photostatic copy of said agreement is hereto attached, marked Exhibit "A," and made a part of this Complaint.

The plaintiff is ready to produce in court the original of said agreement which was prepared and drawn by said defendant or its duly authorized agents or employes.

3. On or about October 19, 1948, the plaintiff, as an independent contractor, at Chicago, Illinois, entered into a written agreement with the defendant, said agreement being identified as Contract K-825, Job 1790, whereby plaintiff was to construct, perform and complete, and to furnish all labor, materials, construction equipment, expendable tools and construction supplies for the excavations, foundations, buildings and superstructure and other necessary and related projects in and about said job for Units 2 and 3 (consisting of two (2) 70,015 low turbine generating units and three (3) 375,000 lb. per hr. steam generating units, and their auxiliary equipments and accessories) of defendant's Michigan City Generating Station, located on Lake Michigan, West of the Harbor at Michigan City, Indiana. A photostatic copy of said agreement is hereto attached, marked Exhibit "B," and made a part of this Complaint. Plaintiff is ready to produce in court the original of said agreement, which was prepared and drawn by the defendant, or its duly authorized agents or employes.

4. As appears from the provisions of the aforesaid agreements, the defendant agreed to pay to the plaintiff in consideration of the plaintiff's faithful accomplish-
5 ment of the work in said agreements described and the undertakings and guaranties of the plaintiff as therein set forth, the "Net Cost" of the work, as defined in Clause (15) of each of said agreements, a "Fixed Equipment Rental Charge," and a "Fixed Fee to cover overhead and profit." Pursuant to the terms of Contract K-814, plaintiff was paid the sum of $344,603.19, and pursuant to the terms of Contract K-825, plaintiff was paid the sum of $2,227,233.03.

5. Thereafter, on or about August 15, 1949, defendant issued to plaintiff "Extra Order No. 1" to Contract No. K-825. Plaintiff was authorized, by the terms of Extra Order No. 1, to increase the amount of Contract K-825 by the sum of Cost plus 8% for the installation of pavement and unloading of material and equipment to be used by other contractors, and other miscellaneous work not specifically covered by Contract K-825. By the provisions of the said Extra Order No. 1, a photostatic copy of which is hereto attached, marked Exhibit "C," and made a part of this Complaint, the terms of the original Contract K-825 were not to be construed as altered in any way except as specifically mentioned in the said Extra Order No. 1. Pursuant to the terms of Extra Order No. 1, plaintiff was paid by the defendant the sum of $118,680.96.

6. The plaintiff faithfully accomplished the work described in the aforesaid agreements and performed and completed all of the undertakings and guaranties thereunder; and the defendant has paid to the plaintiff the amount due the plaintiff in accordance with the provisions of the agreements aforesaid with the exception of the sum of $33,097.15, an expense incurred by the plaintiff under and pursuant to the provisions of Clause (15)(h) of
6 Contracts K-814 and K-825, and by Extra Order No. 1 to Contract K-825, that is, the amount of the State of Indiana Gross Income Tax assessed against the plaintiff, and by it incurred, upon the moneys paid by the defendant to the plaintiff for the work described in said Contracts K-814 and K-825 and Extra Order No. 1 to Contract K-825. Defendant has failed and refused to pay the aforesaid sum of $33,097.15 to plaintiff, although Clause (15)(h) of the said Contracts K-814 and K-825 provides that the "Net Cost" of such work shall include:

> "Amounts required by any Federal, State or local taxes applicable to the Work, including old age benefit and unemployment taxes."

The aforesaid Clause (15)(h) of Contract K-825 was, by the terms of Extra Order No. 1, made a part of and incorporated in Extra Order No. 1.

7. The plaintiff and the defendant on or about April 29, 1952, agreed that the acceptance of all other moneys due the plaintiff under said agreements would not constitute final payment to the plaintiff under said agreements and would be without prejudice to the assertion of plaintiff's claim against the defendant for the aforesaid sum of $33,097.15, being the amount of the State of Indiana Gross Income Tax assessed against the plaintiff for the moneys paid plaintiff under the said agreements.

8. Under and pursuant to the terms and provisions of the aforesaid agreements and by reason of the performance of such agreements by the plaintiff, the defendant is justly indebted to the plaintiff for the aforesaid sum of $33,097.15 incurred by the plaintiff, being the amount of the State of Indiana Gross Income Tax assessed against the plaintiff for moneys paid by the defendant to the plaintiff for the work specified in said agreements.

9. The plaintiff has requested and demanded of the defendant that it pay to the plaintiff said sum of $33,097.15, but the defendant has refused so to do.

Wherefore, plaintiff demands judgment against the defendant for the sum of $33,097.15 with interest as provided by law and for costs of this suit.

Count II.

1. The plaintiff adopts by reference as paragraph one of this Count II of its Complaint all of the allegations set forth in paragraphs one to nine, both inclusive, of Count I of this Complaint.

2. The defendant contends that Clause 15 of the said agreements between the plaintiff and the defendant can-

not be construed so as to include as part of the plaintiff's "Net Cost" the amount assessed against the plaintiff under the State of Indiana Gross Income Tax upon the moneys paid by the defendant to the plaintiff under said agreements. The plaintiff was at the time of the execution of said agreement, and at all times since, a general contractor. At the time of the execution of said agreement and for many years prior thereto and since the execution of said agreement until the date hereof, it was the custom and usage of persons and corporations in the position of the defendant in this case and general contractors performing construction work for such persons and corporations in the State of Indiana that such general contractors under Net Cost and Fixed Fee agreements or contracts for construction work be paid by such persons and corporations for whom such construction work is performed the amount of the State of Indiana Gross Income Tax assessed upon the moneys paid the general contractor for such construction work.

3. The defendant had notice of and acquiesced in the aforesaid custom and usage. The said Contracts K-814, K-825 and Extra Order No. 1 to Contract K-825 were executed by the plaintiff and defendant with reference to, and with knowledge of, said custom and usage.

Wherefore, plaintiff demands judgment against the defendant for the sum of $33,097.15 with interest as provided by law and for costs of this suit.

Count III.

1. The plaintiff adopts by reference as paragraph one of this Count III of its Complaint the allegations set forth in paragraph one of Count I of this Complaint.

2. On or about October 27, 1948, the plaintiff, as an independent contractor, at Chicago, Illinois, entered into a written agreement with the defendant, said agreement

being identified as Contract K-851, Job 1790, to unload, erect and finish in a workmanlike manner at the defendant's Michigan City Generating Station located on Lake Michigan, West of the harbor at Michigan City, Indiana, the structural steel for the main building, including column Base Plates, Coal Bunkers, Steel Stacks, and all structural steel items required to complete the building structure. A photostatic copy of said agreement is hereto attached, marked Exhibit "D," and made a part of this Complaint. Plaintiff is ready to produce in Court the original of said agreement, which was prepared and drawn by the defendant, or its authorized agents or employes.

9 3. As appears from the provisions of said agreement, the defendant agreed to pay to the plaintiff in consideration of the plaintiff's faithful accomplishment of the work in said agreement described and the undertakings and guaranties of the plaintiff as therein set forth, an amount estimated to be $79,150.00.

4. On or about November 18, 1948, the plaintiff, as an independent contractor, at Chicago, Illinois, entered into a written agreement with defendant to drive sheet piling for a distance of approximately 350 lineal feet along the harbor at the defendant's Michigan City, Indiana, Generating Station between the plant intake and the Pullman Pumping Station there located. A photostatic copy of said agreement is hereto attached, marked Exhibit "E," and made a part of this Complaint. Plaintiff is ready to produce in Court the original of said agreement, which was prepared and drawn by the defendant, or its authorized agents or employes.

5. As appears from said agreement, the defendant agreed to pay plaintiff, in consideration of the accomplishment of said work, the cost of said work plus 4%.

6. The plaintiff faithfully accomplished the work described in said agreements and performed and completed

all of its undertakings and guaranties thereunder; and the defendant has paid to the plaintiff the amount due the plaintiff in accordance with the terms of the agreements aforesaid with the exception of the sum of $877.40, said sum being the amount of the State of Indiana Gross Income Tax assessed against the plaintiff and by it incurred upon the moneys paid by the defendant to the plaintiff for the work described in said agreements, which sum defendant has failed and refused to pay the plaintiff.

7. The plaintiff and the defendant on or about April 29, 1952, agreed that the acceptance of all other moneys due the plaintiff under said agreements would be without prejudice to the assertion of plaintiff's claim against the defendant for the aforesaid sum of $877.40, being the amount of the State of Indiana Gross Income Tax assessed against the plaintiff for the moneys paid plaintiff under the aforesaid agreements.

8. The plaintiff was at the time of the execution of said agreements, for a long time prior thereto, and at all times since, a general contractor. At the time of the execution of said agreements and for many years prior thereto and since the execution of said agreements until the date hereof it was the custom and usage of persons and corporations in the position of the defendant in this case and general contractors performing construction work for such persons and corporations in the State of Indiana that such general contractors under Cost Plus and Labor and Material agreements or contracts for construction work be paid by such persons and corporations for whom such construction work is performed the amount of the State of Indiana Gross Income Tax assessed upon the moneys paid the general contractor for such construction work. The defendant had notice of and acquiesced in such custom and usage. The aforesaid agreement of November 18, 1948, identified as Exhibit "E," and Contract K-851,

Job 1790, Exhibit "D," were executed by the plaintiff and defendant with reference to, and with knowledge of, the aforesaid custom and usage.

11 Wherefore, plaintiff demands judgment against the defendant for the sum of $877.40 with interest as provided by law and for costs of this suit.

Herlihy Mid-Continent Company,
By: Frank J. Herlihy,
Its President.

Nash, Ahern & McNally
By: Martin J. McNally,
A member of the firm.
111 West Washington Street,
Chicago 2, Illinois,
FRanklin 2-5464,
Attorneys for plaintiff.

State of Illinois, } ss.
County of Cook. }

Frank J. Herlihy, being first duly sworn on oath deposes and says that he is the President of the plaintiff herein and its agent in this behalf; that he has read the foregoing Complaint by him subscribed as such, and that the allegations therein contained are true in substance and in fact.

Frank J. Herlihy.

Subscribed and Sworn to before me this 28th day of November, 1952.

(Seal) H. T. McManigal.

12 **Exhibit A.**

(Letterhead of Sargent & Lundy Chicago 3, Ill.)

Contract K-814
Job 1790

This Agreement, made this thirteenth day of August 1948, by and between the Herlihy Mid-Continent Company, an Illinois corporation (hereinafter called "Contractor"), and the Northern Indiana Public Service Company, an Indiana corporation (hereinafter called "Purchaser") Witnesseth:

(1) Contractor, as an independent Contractor and not as an agent or employee of Purchaser, agrees to furnish all labor, materials, construction equipment, expendable tools and construction supplies required for, and construct, perform and complete in a workmanlike manner the Storeroom, Drive House Office, Coal Handlers' Locker Rooms, and Elevator Shaft in existing Boiler Room in connection with the 1948 Extension to Purchaser's Michigan City Generating Station, located on Lake Michigan, west of the harbor at Michigan City, Indiana, which work includes the following:

A. Necessary excavation and grading on the site.

B. Alterations to structural steel floors, etc., in the existing boiler room to provide enclosure for new elevator.

C. Roadway and drainage on the site.

D. Sewage disposal system.

E. Substructure of Storeroom below elevation + 5'-0" including all excavation work, driving of sheet piling, foundation piles, backfill, etc.

F. Superstructure of Storeroom above elevation +5'-0".

G. Substructure of Drive House and Locker—Toilet Rooms below elevation +27'-6", including all excava-

tion work driving of sheet piling, foundation piles, backfill, etc.

H. Superstructure of Drive House and Locker—Toilet Rooms above elevation +27'-6".

I. Plumbing and plumbing fixtures.

13 J. Installation in the concrete work of anchors, miscellaneous steel, piping, conduits and other materials.

K. Such additional work as may be reasonably assumed to be part of general building work of this nature including miscellaneous construction buildings, warehouses, etc., except those buildings which are on the site and which are available to Contractor for his use.

L. Laying out of lines and grades relative to established grades and bench marks now in place.

(2) The following items are not a part of the work to be performed under this Contract:

A. Furnishing, fabrication and erection of building frame structural steel.

B. Furnishing and installation of machinery, equipment, and piping.

C. Installation of electrical work.

D. Furnishing and installation of elevators.

(3) Contractor agrees to observe and abide by the "General Conditions" (Form 303) marked Exhibit "A", attached hereto and made a part hereof.

(4) Contractor agrees that the work shall be in accordance with specifications and drawings to be issued from time to time by the Consulting Engineers.

The following drawings by the Consulting Engineers illustrate, in general, the scope and nature of the work:

BS-A	Exterior Elevations
B-39	Plan at Elevation +5'-0"
BS-C	Plan at Elevation +16'-0"
BS-D	Plan at Elevation +27'-0"
BS-E	Plan at Elevation +41'-9" & 43'-6"

SK-B-51-A	Drive House Office and Toilet—Locker Rooms
SK-F	Foundation Plan—Storage Building
B-41	Column Bracing—Storage Building (6-22-43)
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B-43	Floor Framing Plan at Elev. +16'-0"—Storage Building (6-22-48)
B-44	Floor Framing Plan at Elev. +27'-0"—Storage Building (6-22-48)
B-45	Floor Framing Plan at Elev. +41'-9"—Storage Building (6-22-48)
B-46	Roof and Penthouse Framing Plan—Storage Building (6-22-48)

14 (5) Contractor agrees to furnish in good operating condition, as required, all construction equipment, expendable tools, and construction supplies necessary to complete the Work, including the equipment, tools, and supplies shown on his List of Estimated Construction Equipment, Expendable Tools and Construction Supplies dated August 13, 1948, marked Exhibit "B", attached hereto and made a part hereof, and such additional tools, construction equipment and construction supplies as may be required to economically complete the work without charge other than the "Fixed Equipment Rental Charge" set forth in Clause 14 Item C hereof.

(6) Contractor agrees to submit to Purchaser and the Consulting Engineers on or about the twenty-fifth day of each month, a report showing the progress being made in fulfillment of this Contract and a construction schedule of work to be done in the following month in such form as shall be specified by Purchaser. Attached to the report shall be a list showing all construction equipment on the job and a separate list showing additional construction equipment which Contractor proposes to furnish to the job during the following month.

(7) Contractor agrees to promptly erect all necessary temporary buildings and procure materials for the construction of the work.

Contractor further agrees to perform the work in accordance with the following schedule.

A. Alterations to existing boiler room shall be complete ready for the installation of the elevator on or before October 1, 1948.

B. Foundation work shall be complete ready for the erection of structural steel on or before December 1, 1948.

C. The balance of the Work shall be complete on or before April 1, 1949.

(8) It is mutually agreed that if completion of the work is delayed by any act of Purchaser or other Contractor in the employ of Purchaser, by strikes, or by other exceptional conditions over which Contractor has no control, Contractor shall make application in writing for extension of time for completion of the work. Time for completion of the work shall be extended by such period as the Consulting Engineers may consider reasonable.

(9) It is mutually agreed that Purchaser will furnish without charge the following facilities for Contractor's use:

A. All electric power required for Contractor's tools, shops, lighting, etc., at conveniently located centers of distribution. Purchaser shall approve all extensions from his distribution centers, which extensions shall be installed and maintained by Contractor.

Power supply is 440 volt, 3 phase, 60 cycle. Lighting circuit is 230/115 volt, single phase, 60 cycle, 3 wire.

B. Water required by Contractor for his use.

It is mutually understood that a sidetrack connecting with the Chicago, South Shore & South Bend Railroad runs on the station property.

(10) It is mutually agreed that Purchaser shall have the option of specifying the routing of shipments of materials furnished by Contractor.

(11) Contractor agrees to co-operate with Purchaser's construction and operating departments in the execution of the work, and to so conduct the work, as not to interfere with other work being performed at the site.

(12) Contractor guarantees that the work will be of the best quality and satisfactory to the Consulting En-
16 gineers in every particular, and agrees, promptly and at his own expense, to remedy or replace in conformity with this Contract, any part of the work which during the first year of actual use in service proves to be of defective construction.

(13) Contractor expressly waives and releases any and all liens, or claims, or rights of lien, on the premises, on account of labor or material, or both, furnished by him to or on account of Purchaser for said premises.

(14) Purchaser, in consideration of the undertakings and guarantees of Contractor and of the faithful accomplishment of the work, agrees to pay to Contractor an amount equal to the sum of:

A. The "Net Cost" of the Work, as hereinafter defined in Clause 15.

B. A "Fixed Fee" of Nine Thousand Dollars ($9,000.00), to cover overhead and profit, and

C. A "Fixed Equipment Rental Charge" of Seven Thousand Dollars ($7,000.00) to cover the use of all construction equipment, Contractor's field office equipment, expendable tools and construction supplies necessary to complete the Work, including but not restricted to the construction equipment, expendable tools and supplies shown in Exhibit "B".

Said "Fixed Equipment Rental Charge" shall also include the cost of transporting said equipment to and from the site, unloading and reloading equipment at the site as well as at Contractor's original point of

shipment and point of destination when shipped from the job site upon completion of the Work, and any repair and replacement parts and labor required to maintain the equipment in satisfactory operating condition, anti-freeze solution required for protection of equipment and cost of all insurance required for protection of equipment.

Contractor's "Total Fixed Charge" (defined as the sum of B and C above) is $16,000.00 and is subject to adjustment only as provided for under Clause 16.

(15) It is mutually agreed that the "Net Cost" 17 of the work shall include all expenses incurred by Contractor which are directly chargeable to the work, and that said Net Cost of the work shall, without restricting the generality of the foregoing, include the following items:

(a) Cost of all labor and materials for both temporary and permanent use for the Work (except as provided in Clause 14) including the wages of superintendents, timekeepers, auditors, expeditors, material clerks and other employees actually engaged exclusively on the site.

(b) Cost of Labor for installation and dismantling of construction equipment on the site.

(c) Cost of transportation and traveling expenses to and from the site of the necessary administrative and supervisory employees and assistants required on the site (not daily commutations), and any other necessary expenses incurred in procuring labor for the Work.

(d) Cost of transportation and traveling expenses of any of the officers or engineers of Contractor's main office when their services are required on the site, but no charge for their services.

(e) Expenses such as telegrams, telephone, expressage, and postage.

(f) Cost of fuel, greases and lubricating oils used exclusively on the site, but not including anti-freeze solutions required for protection of equipment.

(g) Cost of all forms of insurance for the protection of both Purchaser and Contractor, (except as

provided under Clause 14, Item C), including but not restricted to public liability, workmen's compensation, property damage and builders risk insurance.

(h) Amounts required by any Federal, State or local taxes applicable to the Work, including old age benefit and unemployment taxes.

(i) Cost to Contractor of any part of the Work sublet by him, excluding the value of rental charges for any construction equipment, expendable tools and construction supplies furnished by subcontractors. The value of any rental charges applying to any subcontractor's construction equipment, expendable tools and construction supplies shall be agreed upon before the subcontract shall be let.

(16) The "Total Cost of the Work", including Total Fixed Charge is estimated by the Consulting engineers to be Two Hundred Thirty-five, Thousand Dollars, ($235,000.00). It is mutually agreed that there shall be no change in Contractor's Total Fixed Charge should the Total Cost of the Work, including the Total Fixed Charge, be between $211,500.00 and $258,500.00.

It is mutually agreed that should the Total Cost of the Work including Total Fixed Charge, be more than Two Hundred Fifty-eight Thousand Five Hundred Dollars ($258,500.00), Contractor's Total Fixed Charge shall be increased by an amount which shall be equal to Four Percent (4%) of the difference between the actual Total Cost of the Work, including Total Fixed Charge, and Two Hundred Fifty-eight Thousand Five Hundred Dollars ($258,500.00); but should the Total Cost of the Work including Total Fixed Charge be less than Two Hundred Eleven Thousand Five Hundred Dollars ($211,500.00), Contractor's Total Fixed Charge shall be decreased by an amount which shall be equal to Three Percent (3%) of the difference between the actual Total Cost of the Work, including Total Fixed Charge, and Two Hundred Eleven Thousand Five Hundred Dollars ($211,500.00).

(17) It is mutually agreed that if completion of any part of the work is for any reason delayed beyond the completion dates given in Clause 7 hereof, this shall not be cause for adjustment of the Total Fixed Charge, but that said Total Fixed Charge shall be adjusted only for increases or decreases in the Total Cost of the Work as provided in Clause 16.

(18) Purchaser agrees to make monthly payments to Contractor, as materials are delivered on the premises and work is done, provided said materials and work are in accordance with the terms of this Contract, and are shown to be free from liens, but the total sum of such payments on account shall at no time before the completion of the Work exceed Ninety-five Percent (95%) of the mutually-agreed-upon value of the materials furnished by Contractor delivered on the premises and work done, plus Ninety-five Percent (95%) of the proportionate part of the Total Fixed Charge, based on the ratio that the amount paid up to that time on account of the Net Cost of the Work bears to the mutually-agreed-upon estimate of the Net Cost of the Work. The final amount due Contractor shall be payable sixty (60) days after the date of completion of the Work, provided the terms of this Contract have otherwise been complied with at that time.

(19) Contractor agrees to furnish without charge, other than the Total Fixed Charge hereinbefore provided, his business system, his engineering, construction and purchasing skill, his patent method and patent rights in his appliances, any interest on account of capital or borrowed money employed, the attention and services of his executive officers, managers, engineers and other employees in his main or district offices during the life of this Contract, and main or district office overhead and expenses including rent, stenographic, clerical and accounting help, office supplies, stationery, postage and local telephone service.

(20) Contractor shall be responsible for purchasing and expediting manufacture and delivery of material required for the Work. Contractor shall also be responsible for obtaining bids from at least three bidders, for main items of material required for the Work, and shall prepare and submit tabulations thereof together with copies of proposals to Purchaser and Consulting Engineers for approval.

(21) It is mutually agreed that all net earnings from rebates, refunds, or discounts, shall be accounted for by Contractor and applied in reduction of the Net Cost of the Work. Contractor further agrees that all bills to be paid by him on account of the Net Cash of the Work shall be so paid as to take advantage of any and all trade, time or other discounts.

(22) It is mutually agreed that the Net Cost of Work shall be credited with the fair salvage value of all unused materials previously included in the Net Cost of the Work.

(23) It is mutually agreed that Contractor shall furnish Purchaser with such statements, payrolls, invoices, and other sustaining papers, as may be required to provide Purchaser with a clear and adequate record of all payments by Contractor under this Contract, and that Purchaser shall have the right at any time to inspect Contractor's accounting records. Contractor further agrees to keep, protect and make available to Purchaser for a period of one year after completion of the Work all records and books of accounting pertaining to the Work.

(24) If Contractor should fail to perform the Work or comply with the terms and conditions of this Contract and specifications to be issued, should be adjudged a bankrupt, or make a general assignment for benefit of creditors, or if a receiver be appointed for his business, then Purchaser may, without prejudice to any other right or remedy, and

after giving Contractor ten (10) days written notice, terminate this Contract and take possession of the premises, construction equipment, expendable tools and construction supplies, and finish the Work as he may deem advisable. In any such case, Purchaser will pay Contractor only for the portion of the Work completed up to that time, the proportionate part of Contractor's Total Fixed Charge and a reasonable rental for the use, subsequent to termination of Contract, of Contractor's construction equipment, expendable tools and construction supplies.

(25) If it appears advisable to Contractor to work in excess of the regular forty hour week, he shall make written application to Purchaser for approval. No overtime work will be allowed without Purchaser's written approval.

In Witness Whereof: The parties hereto have caused this Contract to be signed by their respective officers, thereunto duly authorized.

Herlihy Mid-Continent Company,
By F. J. Herlihy, Pres. /s/

Attest:
H. T. McMaugh /s/ (Seal)
Secretary.

Northern Indiana Public Service Company,
By Dean H. Mitchell /s/

Attest:
W. A. McDonough /s/ (Seal)
Secretary

Approved Sargent & Lundy By L. S. Anda
Northern Indiana Public Service Co.
F. L. Reinmann /s/ JOV 9/27/48 /s/
D. L. Bement /s/
A. Lindeman /s/

22 **Exhibit "A".**

General Conditions

(Form 303)

1. Definitions: The Contract consists of the Agreement, these General Conditions, the Specification and Drawings (if any), and any other Exhibits specified in the Agreement.

Purchaser and Contractor are those mentioned as such in the Agreement. They are treated throughout the Contract as if each were of masculine gender and singular number.

Wherever in the Contract the term "Consulting Engineers" is used, it refers to Purchaser's consulting engineers, Sargent & Lundy.

The term "Work" includes such labor, methods, material, equipment, and transportation or other facilities as may be necessary to complete the contract.

2. Supervision: The Work shall be conducted under the general supervision of the Consulting Engineers. They shall interpret the Contract and any supplementary specifications or drawings issued by them, and shall arbitrate any controversies in regard to the Work that may arise between the contracting parties or between Contractor and other contractors, the Consulting Engineer's decision to be final.

3. Verification of Dimensions: The exactness of dimensions given on any drawings issued by the Consulting Engineers is not guaranteed by them or by Purchaser. Contractor shall therefore satisfy himself as to the accuracy of all dimensions. In all cases of interconnection of the Work with other work he shall verify at the site any dimensions relating to such other work. Any errors due to Contractor's failure so to verify any such dimensions shall

be promptly rectified by Contractor without cost to Purchaser.

4. Contractor's Drawings: Any drawings requiring the Consulting Engineers' approval shall be submitted by Contractor without unreasonable delay, and no work affected thereby shall be started until the Consulting Engineers' written approval has been obtained. Approval will not relieve Contractor from fulfilling all obligations and guarantees under the Contract.

5. Samples: Contractor shall furnish for approval all samples of the Work required by the Consulting Engineers.

6. Inspection and Testing: Purchaser shall have the right at all reasonable times to inspect and test the Work. Contractor shall make all necessary arrangements and provide all reasonable facilities and access for such inspection and testing, either at Contractor's shop or at the mills or shops of any manufacturer where any part of the Work is being fabricated or manufactured. Contractor shall ascertain the scope of any inspection which may be contemplated, and shall give ample notice as to the time when each part of the Work will be ready for such inspection. Purchaser may reject any work found to be defective or not in accordance with the Contract, regardless of the stage of its completion or the time or place of discovery of such errors, and regardless of whether Purchaser's inspector has previously accepted the work through oversight or otherwise.

7. Use of Premises: Before beginning the Work, Contractor shall inspect any of Purchaser's store rooms, storage space, offices, or other accommodations which may be made available to him by Purchaser, and shall arrange with Purchaser for their use. In case of dispute between contractors as to the use of any such accommodations, Purchaser or the Consulting Engineers will make the final allotment. Contractor shall not endanger

any part of the premises or structures of Purchaser by overloading..

8. Public Regulations: All necessary building permits shall be taken out by Contractor and shall be paid for by Purchaser.—All other necessary permits, licenses, etc., shall be taken out by Contractor at his own expense. Contractor shall give all required notices and shall comply with all applicable laws, ordinances, and regulations of any public authorities having jurisdiction. If Contractor discovers that any Specification or Drawings forming a part of the Contract are at variance with such legal requirements, he shall promptly notify the Consulting Engineers in writing. If Contractor performs any work which is contrary to any such laws, ordinances, or regulations, and without giving such notice to the Consulting Engineers, he shall bear all penalties and costs arising therefrom. The Work shall also comply with the regulations of the National Board of Fire Underwriters, except as may be otherwise specified in the Contract.

9. Erection: Contractor shall provide all labor tools, hoists, materials, scaffolding, false work, etc., which may be necessary for the Work.

Contractor shall maintain a competent superintendent at the site at all times to supervise the Work and conduct it in co-operation with Purchaser of the Consulting Engineers, and in co-ordination with all other work being done on the premises. Contractor shall employ a competent engineer to determine lines and elevations. Contractor shall lay out the Work and shall be responsible for its correctness. He shall correct at his own expense all errors in the Work arising from his inaccuracy.

Contractor shall arrange, schedule, and carry on the Work so as not to interfere with the delivery and erection of the work of others. To facilitate the erection of such other work Contractor shall, without cost to Purchaser,

cease work at any point, when so directed by the Consulting Engineers, and transfer his men to other portions of the Work, returning them thereafter to complete the unfinished work at such time as the Consulting Engineers may designate.

If in Purchaser's judgment it is desirable, Contractor shall at Purchaser's request remove any employee from the Work.

Contractor shall do such cutting, fitting, and patching as may be required to install the Work and shall, at all points of contact, properly fit it to existing work. Contractor shall not endanger any work by cutting, digging, or otherwise, and shall not cut or alter the work of any other contractor except with the authorization of Purchaser or the Consulting Engineers.

10. Changes in the Work: Purchaser shall have the right to make any changes in the Work, the contract price being increased or decreased accordingly. Except in an emergency endangering life or property, no claim for work involving additional cost shall be allowed unless it shall have been ordered in writing by Purchaser.

24 11. Correction of Work: Cont actor shall promptly remove from Purchaser's premises all materials condemned by the Consulting Engineers on account of failure to conform to the Contract, whether actually incorporated in the Work or not, and Contractor shall at his own expense, promptly replace such condemned materials with other materials conforming to the requirements of the Contract. Contractor shall also bear the expense of restoring all work of other contractors damaged by any such removal or replacement. If Contractor does not remove any such condemned work within a reasonable time after written notice by the Consulting Engineers, Purchaser may remove it at Contractor's expense.

12. Purchaser's Right to do Work: If Contractor fails

to carry on the erection with the diligence necessary to insure the prompt completion of the Work, Purchaser may order him to employ more men, machinery, tools, etc., specifying the additional requirements. If Contractor fails to comply with such direction within six days from the receipt thereof, Purchaser may employ such additional men, machinery, tools, etc., as shall be necessary to complete the Work promptly, and the cost thereof to Purchaser shall be deducted from any sums then or thereafter due Contractor under the Contract; or Purchaser may elect to take over the Work, and may use at his option any of Contractor's tools, plant, equipment, and materials which are on or about the premises, the amount due Contractor for any such plant rental or materials to be determined by the Consulting Engineers.

13. Cleaning Up: Contractor shall at all times prevent the accumulation on Purchaser's premises of debris caused by the Work and upon its completion shall remove from the site all such debris, and also his tools, scaffolding, and surplus materials, and shall leave the Work in good order and condition. In case of dispute, Purchaser may remove the debris and charge the cost to the contractors concerned, in proportions determined by Purchaser or the Consulting Engineers.

14. Loss or Damage: Until accepted in its entirety by Purchaser, the Work shall be at Contractor's risk, and if any loss of or damage to the Work occurs prior to acceptance, Contractor shall, without cost to Purchaser, promptly repair or replace the parts so lost or damaged. All loss or damage to Contactor's property shall be borne by Contractor. Contractor shall protect Purchaser's property from and shall be responsible for any loss or damage arising out of the execution of the Work. Contractor shall not be responsible, however, for any loss or damage directly caused by Purchaser's negligence and without Contractor's

contributory negligence, except that Contractor shall be solely responsible for any loss or damage due to the use of any facilities or service furnished by Purchaser, such as switching, hoisting, etc., regardless of Purchaser's negligence.

15. Indemnity: Contractor shall indemnify and save Purchaser harmless from and against all losses, and all claims, demands, suits, actions, payments, and judgments arising from personal injuries or otherwise, brought or recovered against Purchaser by reason of any act or omission of Contractor in the execution or guarding of the Work.

16. Liability Insurance: Contractor shall provide and maintain such insurance as will protect Purchaser, the Consulting Engineers, Contractor, and any sub-contractors from claims under Workmen's Compensation Acts, and against loss by reason of any liability imposed by law for damages on account of injuries or death sustained by any person or persons arising from operations under the Contract carried on by Contractor or any of his sub-contractors. Said insurance shall be under such policies and forms and in such company or companies as are satisfactory to Purchaser, and certificates of said insurance shall be filed with Purchaser if he so requires.

17. Payments: No certificates given or payments made shall be considered as conclusive evidence of the performance of the Contract, either wholly or in part, nor shall any certificate or payment be construed as acceptance of defective work. Contractor shall, if requested, at any time during the progress of the Work, furnish Purchaser or the Consulting Engineers with a verified certificate showing Contractor's total outstanding indebtedness in connection with the Work. Before final payment is made, Contractor shall satisfy Purchaser, by affidavits or otherwise, that there are no outstanding liens against Purchaser's prem-

ises by reason of any work under the Contract. Acceptance by Contractor of final payment on the contract price shall constitute a waiver of all claims against Purchaser.

18. Contractor's Indebtedness: If during the progress of the Work Contractor shall allow any indebtedness to accrue for work furnished by sub-contractors or others and shall, within five days after demand made, fail to pay and discharge such indebtedness, then Purchaser may, during the period for which such indebtedness shall remain unpaid, withhold from the unpaid portion of the contract price a sum equal to the amount of such unpaid indebtedness or may apply the sum so withheld to the discharge of such indebtedness.

19. Assignment or Sublease: Contractor shall not assign the Contract or sub-let any part of the Work without first obtaining Purchaser's written approval. Approval of a sub-contractor will not be given unless Purchaser has been furnished with satisfactory evidence that the proposed sub-contractor is carrying ample workmen's compensation and public liability insurance to the same extent and in the same manner as is herein provided to be furnished by Contractor, and such approval, if given, shall not relieve Contractor from full responsibility for the Work or the fulfillment of all obligations under the Contract.

20. Patents: Contractor shall pay all royalties and license fees which may be payable on account of the Work or any part thereof. He shall defend all suits or proceedings instituted against Purchaser for the infringement of any patent rights, and shall pay all awards of damages assessed and all costs of suit adjudged against Purchaser in such suits or proceedings, provided Purchaser gives Contractor reasonable notice in writing of the institution of any such suit or proceeding, permits him to defend it, and gives him all such information, assistance, and authority

as shall be necessary to enable him so to do. In case any part of the Work is held in any such suit to constitute infringement and its use is enjoined, Contractor shall within a reasonable time either (1) secure for Purchaser the right to continue the use of such part of the Work by procuring for Purchaser a license or such other permission as will enable Contractor to secure the suspension of the injunction, or (2) replace at Contractor's own expense such part of the Work with a noninfringing part or modify it so that it becomes non-infringing. If, however, Contractor is unable, after reasonable effort, to secure such license or permission, or to make such replacement or modification, he shall remove the part so enjoined from Purchaser's premises and refund that portion of the contract price which represents any part affected by the injunction.

26 **Exhibit "B".**

Herlihy Mid-Continent Company,
Chicago, Illinois.

August 13, 1948

List of Estimated Construction Equipment.

Expendable Tools and Construction Supplies for Substructure, Superstructure of Storeroom, etc.
Michigan City Generating Station.

12 Rubber Tired Wheelbarrows
1 Table Saw
2 Skillsaws
2 Burning Torches
1 Transit and Tripod
1 Level and Tripod
Engineer's Tapes, Rules, Plumb Bobs, Etc.
1 Suction Hose 20' Long 2"
1 Suction Hose 20' Long 4"

4 Lengths Discharge Hose 2½"-50' Long
Water Hose 150'
2" Pipe—200 Ft.
4" Pipe—400 Ft.
6 Pcs. Air Hose 50' Long
Drills
Bull Points
Steam Hose
1 Brick Hoist
Patent Scaffold
Tools
Load and Unload & Transport
Load for Pile Hammer
1 Complete Set Office Equipment
1 Koehring Crane #501
1 Clamshell Bucket—¾ Yard
1 Pickup Truck
1 Flat Bed Truck—1½ Tons
2 Dump Trucks—4 Yard
1 Diesel Compressor—315 C. F.
1 Air Receiver
6 Clay Spades
4 Concrete Breakers
1 Pile Hammer
1 Boiler
1 Tractor and Bulldozer
1 Concrete Mixer—½ Cubic Yard
1 Heating Boiler
1 Conrete Bucket—1 Cubic Yard
2 Floor Hoppers
1 Batch Scale
1 Welding Machine
1 Gas Pump 2"
1 Gas Pump 4"
4 Tugger Hoists
1 Concrete Vibrator
1 Finishing Machine
6 Concrete Buggies

Certain pieces of equipment listed above will be required for the life of the job, while other pieces will be required either intermittently or for shorter periods of time.

While we have attempted in the above list to cover all items of equipment that may be required, it is understood that if any equipment not listed is required for the carrying out of the work, such additional equipment will be furnished without additional cost other than the lump sum for equipment use. Likewise, if it is found that some of the pieces of equipment listed are not required, the lump sum will not be reduced.

All of the equipment listed is now owned by us except the Patent scaffold which we will rent from the Patent Scaffold Company, the cost of which is included in the lump sum for equipment use.

27 **Exhibit B.**

(Letterhead of Sargent & Lundy, Chicago 3, Illinois.)

Contract K-825
Job 1700
R

This Agreement, made this nineteenth day of October, 1948, by and between the Herlihy Mid-Continent Company, an Illinois corporation (hereinafter called "Contractor"), and the Northern Indiana Public Service Company, an Indiana corporation (hereinafter called "Purchaser"), Witnesseth:

(1) Contractor, as an independent Contractor and not as an agent or employee of Purchaser, agrees to furnish all labor, materials, construction equipment, expendable tools and construction supplies required for, and construct, perform and complete in a workmanlike manner for Units 2 & 3 (consisting of two (2) 70,015 kw turbine generating units and three (3) 375,000 lb per hr steam generating units, and their auxiliary equipments and accessories) of

Purchaser's Michigan City Generating Station, located on Lake Michigan, west of the harbor at Michigan City, Indiana, the following Work:

A. Necessary excavation and grading on the site.

B. Driving of steel pipe, furnished by Purchaser for piling, removal of earth and filling portion of pipe with concrete.

C. Alterations to existing structure as called for on the drawings and as required to complete the Work.

D. Sewers, sewage disposal system and drainage system.

E. Relocation of existing roadway.

F. Railroad track work for new car dumper.

G. Substructure of Main Building below elevation, including all excavation work, driving of sheet piling, piles, foundations, backfill, etc.

H. Superstructure of Main Building above elevation.

I. Foundations, duct runs and manholes for outdoor substations.

28 J. Substructure and Superstructure of Relay House.

K. Intake screen structure, intake and discharge pipe tunnel.

L. Car dumper foundation and foundations for outdoor coal handling system.

M. Gunite lining of coal bunkers, stacks, flues and ducts.

N. Turbine and equipment foundations, including grouting of equipment.

O. Installation in the concrete work of anchors, miscellaneous steel, piping, conduits and other materials.

P. Such additional work as may be reasonably assumed to be part of general building work of this nature including miscellaneous construction buildings, warehouses, etc., except those buildings which are on the site and which are available to Contractor for his use.

Q. Preparation of details of cofferdam and bracing

for crib structure, and other structures, details of form work for all main parts of all structures necessary to complete the Work and details for miscellaneous steel and other materials to be placed in the walls, floors, foundations and other parts of the substructure and superstructure. All drawings must be approved by the Consulting Engineers before construction is started.

R. Laying out of lines and grades relative to established grades and bench marks now in place.

(2) The following items are not a part of the Work to be performed under this Contract:

A. Furnishing, fabrication and erection of building frame structural steel, steel stack and coal bunkers.

B. Furnishing and installation of machinery, equipment, and piping.

C. Installation of electrical work.

(3) Contractor agrees to observe and abide by the "General Conditions" (Form 303) marked Exhibit "A", attached hereto and made a part hereof.

(4) Contractor agrees that the Work shall be in accordance with specifications and drawings to be issued
29 from time to time by the Consulting Engineers. The following drawings by the Consulting Engineers, illustrate, in general, the scope and nature of the Work:

MS-25 Main Floor Plan
MS-26 Basement Plan
MS-27 Miscellaneous Plans
MS-28 Cross Section Through Turbine and Boiler Rooms
MS-29 Cross Section Through Boiler Room
MS-31 Coal Handling System—General Arrangement
MS-32 Coal Handling System—Breaker House
MS-33 Coal Handling System—Breaker House
MS-36 Roof Framing Plan—Boiler Room
MS-37 Section 4-A Through Boiler Room
MS-38 Section B-B Through Boiler Room
MS-39 Roof Framing Through Boiler Room

MS-42 Turbine Room Main Floor
MS-43 Turbine Room Main Floor
MS-44 Turbine Room Basement Steel
MS-45 Turbine Room Basement Steel
MS-47 Layout of Proposed Circulating Water Piping
MS-48 Sections of Proposed Circulating Water Piping
MS-50 Crib House
MS-51 Upper Plan—Turbine Foundation
MS-52 Lower Plan—Turbine Foundation
MS-53 Section A-A—Turbine Foundation
MS-54 Section B-B—Turbine Foundation
MS-55 Cross Section—Turbine Foundation
MS-56 General Arrangement Plan
MS-62 Upper Cross Section—Boiler Room
MS-63 Fan Floor Plan
MS-64 Turbine Room Basement Plan
MS-65 Boiler Room Basement Plan
MS-66 Boiler Room Basement Plan

(5) Contractor agrees to furnish in good operating condition as required, all construction equipment, expendable tools, and construction supplies necessary to complete the Work, including the equipment, tools, and supplies shown on his List of Estimated Construction Equipment, Expendable Tools and Construction Supplies dated October 19, 1948, marked Exhibit "B", attached hereto and made a part hereof, and such additional tools, construction equipment and construction supplies as may be required to economically complete the Work without charge other than the "Fixed Equipment Rental Charge" set forth in Clause 14 Item C hereof.

30 (6) Contractor agrees to submit to Purchaser and the Consulting Engineers on or about the twenty-fifth day of each month, a report showing the progress being made in fulfillment of this Contract and a construction schedule of work to be done in the following month in such form as shall be specified by Purchaser. Attached to

the report shall be a list showing all construction equipment on the job and a separate list showing additional construction equipment which Contractor proposes to furnish to the job during the following month.

(7) Contractor agrees, promptly, to erect all necessary temporary buildings and procure materials for the construction of the Work.

Contractor further agrees to perform the Work in accordance with the following schedule:

A. Foundation work for the Boiler Room shall be complete on or before June 1, 1949.

B. Foundation work for the Turbine Room shall be complete on or before October 1, 1949.

C. Foundation work for the switchyards and superstructure work for the relay houses shall be complete on or before May 1, 1950.

D. All other foundation work shall be complete on or before May 1, 1950.

E. Superstructure work shall be substantially complete on or before May 1, 1950.

(8) It is mutually agreed that if completion of the Work is delayed by any act of Purchaser or other Contractor in the employ of Purchaser, by strikes, or by other exceptional conditions over which Contractor has no control, Contractor shall make application in writing for extension of time for completion of the Work. Time for completion of the Work shall be extended by such period as the Consulting Engineers may consider reasonable.

31 (9) It is mutually agreed that Purchaser will furnish without charge the following facilities for Contractor's use:

A. All electric power required for Contractor's tools, shops, lighting, etc., at conveniently located centers of distribution. Purchaser shall approve all extensions from his distribution centers which extensions shall be installed and maintained by Contractor.

Power supply is 440 volt, 3 phase, 60 cycle. Lighting circuit is 230/115 volt, single phase, 60 cycle, 3 wire.

B. Water required by Contractor for his use.

It is mutually understood that a sidetrack connecting with the Chicago, South Shore & South Bend Railroad runs on the station property.

(10) It is mutually agreed that Purchaser shall have the option of specifying the routing of shipments of materials furnished by Contractor.

(11) Contractor agrees to co-operate with Purchaser's construction and operating departments in the execution of the Work, and to so conduct the Work, as not to interfere with other work being performed at the site.

(12) Contractor guarantees that the Work will be of the best quality and satisfactory to the Consulting Engineers in every particular, and agrees, promptly and at his own expense, to remedy or replace in conformity with this Contract, any part of the Work which during the first year of actual use in service proves to be of defective construction.

(13) Contractor expressly waives and releases any and all liens, or claims, or rights of lien, on the premises, on account of labor or material, or both, furnished by him to or on account of Purchaser for said premises.

(14) Purchaser, in consideration of the undertak-
32 ings and guarantees of Contractor and of the faithful accomplishment of the Work, agrees to pay to Contractor an amount equal to the sum of:

A. The "Net Cost" of the Work, as hereinafter defined in Clause 15.

B. A "Fixed Fee" of Thirty-Seven Thousand Five Hundred Dollars ($37,500.00), to cover overhead and profit, and

C. A "Fixed Equipment Rental Charge" of Fifty-Seven Thousand Five Hundred Dollars ($57,500.00) to cover the use of all construction equipment, Contractor's field office equipment, expendable tools and construction supplies necessary to complete the Work, including, but not restricted to the construction equipment, expendable tools and supplies shown in Exhibit "B".

Said "Fixed Equipment Rental Charge" shall also include the cost of transporting said equipment to and from the site, unloading and reloading equipment at the site as well as at Contractor's original point of shipment and point of destination when shipped from the job site upon completion of the Work, and any repair and replacement parts and labor required to maintain the equipment in satisfactory operating condition, anti-freeze solution required for protection of equipment and cost of all insurance required for protection of equipment.

Contractor's "Total Fixed Charge" (defined as the sum of B and C above) is $95,000.00 and is subject to adjustment only as provided for under Clause 16.

(15) It is mutually agreed that the "Net Cost" of the Work shall include all expenses incurred by Contractor which are directly chargeable to the Work, and that said Net Cost of the Work shall, without restricting the generality of the foregoing, include the following items:

(a) Cost of all labor and materials for both temporary and permanent use for the Work (except as provided in Clause 14) including the wages of superintendent, timekeepers, auditors, expediters, material clerks and other employees actually engaged exclusively on the site.

(b) Cost of labor for installation and dismantling of construction equipment on the site.

33 (c) Cost of transportation and traveling expenses to and from the site of the necessary administrative and supervisory employees and assistants required on

the site (not daily commutations), and any other necessary expenses incurred in procuring labor for the Work.

(d) Cost of transportation and traveling expenses of any of the officers or engineers of Contractor's main office when their services are required on the site, but no charge for their services.

(e) Expenses such as telegrams, telephone, expressage, and postage.

(f) Cost of fuel, greases and lubricating oils used exclusively on the site, but not including anti-freeze solutions required for protection of equipment.

(g) Cost of all forms of insurance for the protection of both Purchaser and Contractor, (except as provided under Clause 14, Item C), including but not restricted to public liability, workmen's compensation, property damage and builders risk insurance.

(h) Amounts required by any Federal, State or local taxes applicable to the Work, including old age benefit and unemployment taxes.

(i) Cost to Contractor of any part of the Work sublet by him, excluding the value of rental charges for any construction equipment, expendable tools and construction supplies furnished by subcontractors. The value of any rental charges applying to any subcontractor's construction equipment, expendable tools and construction supplies shall be agreed upon before the subcontract shall be let.

(16) The "Total Cost of the Work", including Total Fixed Charge is estimated by the Consulting Engineers to be One Million Fifty Thousand Dollars ($1,050,000.00). It is mutually agreed that there shall be no change in Contractor's Total Fixed Charge should the Total Cost of the Work, including the Total Fixed Charge, be between $945,000.00 and $1,155,000.00.

It is mutually agreed that should the Total Cost of the Work including Total Fixed Charge, be more than One Million One Hundred Fifty-Five Thousand Dollars ($1,-
155,000.00), Contractor's Total Fixed Charge shall be
34 increased by an amount which shall be equal to Four Percent (4%) of the difference between the actual Total Cost of the Work, including Total Fixed Charge, and One Million One Hundred Fifty-Five Thousand Dollars ($1,155,000.00); but should the Total Cost of the Work including Total Fixed Charge be less than Nine Hundred Forty-Five Thousand Dollars ($945,000.00), Contractor's Total Fixed Charge shall be decreased by an amount which shall be equal to Three Percent (3%) of the difference between the actual Total Cost of the Work, including Total Fixed Charge, and Nine Hundred Forty-Five Thousand Dollars ($945,000.00).

(17) It is mutually agreed that if completion of any part of the Work is for any reason delayed beyond the completion dates given in Clause 7 hereof, this shall not be cause for adjustment of the Total Fixed Charge, but that said Total Fixed Charge shall be adjusted only for increases of decreases in the Total Cost of the Work as provided in Clause 16.

(18) Purchaser agrees to make monthly payments to Contractor, as materials are delivered on the premises and work is done; provided said materials and work are in accordance with the terms of this Contract, and are shown to be free from liens, but the total sum of such payments on account shall at no time before the completion of the Work exceed Ninety-Five Percent (95%) of the mutually-agreed-upon value of the materials furnished by Contractor delivered on the premises and work done, plus Ninety-Five Percent (95%) of the proportionate part of the Total Fixed Charge, based on the ratio that the amount

paid up to that time on account of the Net Cost of the Work bears to the mutually-agreed-upon estimate of the Net Cost of the Work. The final amount due Contractor shall be payable sixty (60) days after the date of completion of the Work, provided the terms of this Contract have otherwise been complied with at that time.

(19) Contractor agrees to furnish without charge, other than the Total Fixed Charge hereinbefore provided, his business system, his engineering, construction and purchasing skill, his patent method and patent rights in his appliances, any interest on account of capital or borrowed money employed, the attention and services of his executive officers, managers, engineers and other employees in his main or district offices during the life of this Contract, and main or district office overhead and expenses including rent, stenographic, clerical and accounting help, office supplies, stationery, postage and local telephone service.

(20) Contractor shall be responsible for purchasing and expediting manufacture and delivery of material required for the Work. Contractor shall also be responsible for obtaining bids from at least three bidders, for main items of material required for the Work, and shall prepare and submit tabulations thereof together with copies of proposals to Purchaser and Consulting Engineers for approval.

(21) It is mutually agreed that all net earnings from rebates, refunds, or discounts, shall be accounted for by Contractor and applied in reduction of the Net Cost of the Work. Contractor further agrees that all bills to be paid by him on account of the Net Cost of the Work shall be so paid as to take advantage of any and all trade, time or other discounts.

(22) It is mutually agreed that the Net Cost of the

Work shall be credited with the fair salvage value of all unused materials previously included in the Net Cost of the Work.

(23) It is mutually agreed that Contractor shall furnish Purchaser with such statements, payrolls, invoices, and other sustaining papers, as may be required to provide Purchaser with a clear and adequate record of all payments by Contractor under this Contract, and that Purchaser shall have the right at any time to inspect Contractor's accounting record. Contractor further agrees to keep, protect and make available to Purchaser for a period of one year after completion of the Work all records and books of account pertaining to the Work.

36 (24) If Contractor should fail to perform the Work or comply with the terms and conditions of this Contract and specifications to be issued, should be adjudged a bankrupt, or make a general assignment for benefit of creditors, or if a receiver be appointed for his business, then Purchaser may, without prejudice to any other right or remedy, and after giving Contractor ten (10) days written notice, terminate this Contract and take possession of the premises, construction equipment, expendable tools, and construction supplies, and finish the Work as he may deem advisable. In any such case, Purchaser will pay Contractor only for the portion of the Work completed up to that time, the proportionate part of Contractor's Total Fixed Charge and a reasonable rental for the use, subsequent to termination of Contract, of Contractor's construction equipment, expendable tools and construction supplies.

(25) If it appears advisable to Contractor to work in excess of the regular forty hour week, he shall make written application to Purchaser for approval. No overtime work will be allowed without Purchaser's written approval.

In Witness Whereof: The parties hereto have caused this Contract to be signed by their respective officers, thereunto duly authorized.

Herlihy Mid-Continent Company,
By F. J. Herlihy, /s/
Pres.

Attest:
H. T. McDougal, /s/ (Seal)
Secretary.

Northern Indiana Public Service Company,
By Dean H. Mitchell, /s/
President.

Attest:
I. E. Fasan, /s/ (Seal)
Assistant Secretary.

Northern Indiana Public Service Co.
F. L. Reinman /s/ JOV 12/1/48 /s/
R. M. Schahfer /s/
A. Lindeman /s/

Approved:
Sargent & Lundy,
By T. W. Suda.

37-41 General Conditions not printed here as they are printed as a part of Exhibit A.

42 **Exhibit C.**

Northern Indiana Public Service Company
500 Broadway
Gary, Indiana

Extra Order
Copy No. 4—
Purchasing Dept.
Contract No. K-825
Date of Contract 9-19-48
Extra Order No. 1
Date of Extra Order 8-15-49

Contractor: Herlihy Mid-Continent Company
Address: 79 West Monroe Street
Chicago 3, Illinois

(1) Description of Original Contract:
Substructure and Superstructure—Main Building.

(2) You are hereby authorized to increase the amount of the Contract previously authorized by the sum of ($.....) Cost plus 8% (See Herlihy Mid-Continent Co. letter to A. F. Lindeman dated 7/22/49).

(3) Description of Change:
Installing pavement and unloading of material and equipment which will be used by other contractors when they do not have the type equipment needed. Any other miscellaneous work not specifically covered by Contract K-825.

(4) Reasons for This Alteration Are:
To include necessary work which has not previously been covered by contract.

Amount of Original Contract.....	Est.	$ 1,050,000.00
Total Previous Additions...	$.....	
Amount of this Addition...	$.....	$.....
Total Previous Deductions..	$.....	
Amount of this Deduction..	$.....	$.....
Total Amount of Contract.....		$.....

Charge to Work Order No.....
Charge to Account No.....

This Extra Order shall not be construed to alter in any way the terms of the original Contract, except as herein specifically mentioned.

Northern Indiana Public Service Company,
By (Signature illegible),
Purchasing Agent

43 **Exhibit "C".**

K-851

Summary of Proposal for
Erection of Structural Steel
For Main Building
Michigan City Operating Station—Units 2 & 3

Herlihy Mid-Continent Company

	(Insert all data in this column)
1. Price Per Lb. for unloading and erection of structural steel, based on above estimated tonnage, as follows:	
A. Structural members (beams, girders, columns, etc., and connections—estimated quantity 550 tons)	0.035 per lb.
B. Coal Bunkers (plates, angles, connections, etc., estimated quantity for 3 bunkers 80 tons)	0.080 per lb.
C. 3 Riveted Steel Stacks approximate diameter 8'-6" at top and 15'-0" at base x 170' high (plates, cast iron coping, ladder, hopper bottom, flue connection, etc.; total estimated quantity 150 tons)	0.080 per lb.
D. Bracing members (angles, connections, tie rods, including curb angles, guard plates, etc., estimated quantity 50 tons)	0.035 per lb.

	(Insert all data in this column)
E. Column base plates (estimated quantity 5 tons)	0.035 per lb.
Note: The above quantities are preliminary estimated weights. The actual weights will probably vary from the estimated quantities. The prices per pound given above shall also cover any reasonable net increase or decrease from the estimated weights to the actual weights of the steel erected.	

2. Unit Prices for field work not covered by the drawings:

For removing rivets (ea.)	$0.38
For drilling holes in existing steel (ea.)	1.48
For driving new rivets in old steel to old steel (ea.)	1.45

44

Unit Prices, Cont'd

For 5/16" fillet weld per lineal inch in old steel to old steel	$0.24
For ⅜" fillet weld per lineal inch in old steel to old steel	0.37
For ½" fillet weld per lineal inch in old steel to old steel	0.58
For ⅝" fillet weld per lineal inch in old steel to old steel	0.72
For ⅜" butt weld per lineal inch in old steel to old steel	0.25
For ½" butt weld per lineal inch in old steel to old steel	0.48
For ⅝" butt weld per lineal inch in old steel to old steel	0.58
For ¾" butt weld per lineal inch in old steel to old steel	0.98

	(Insert all data in this column)
3. "Cost Plus" basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is	37½%

Herlihy Mid-Continent Company,
By .....
President.

September 28, 1948.

45 Exhibit D.

Sargent & Lundy
(Not Incorporated)
Engineers
Chicago 3, Illinois

Contract K-851
Job 1790

This Agreement, made this twenty-seventh day of October, 1948, by and between the Herlihy Mid-Continent Company, an Illinois corporation (hereinafter called "Contractor"), and the Northern Indiana Public Service Company, an Indiana corporation (hereinafter called "Purchaser"), Witnesseth:

(1) Contractor agrees to perform the following Work:

Unload, erect and finish in a workmanlike manner at Purchaser's Michigan City Generating Station, located on

Lake Michigan, west of the harbor at Michigan City, Indiana, in connection with Units 2 and 3, the following:

Structural Steel, for main building, including column base plates, coal bunkers, steel stacks, and all structural steel items required to complete the building structure, as hereinafter specified.

(2) Contractor agrees to observe and abide by the "General Conditions" (Form 303) marked Exhibit "A", attached hereto and made a part hereof.

(3) Contractor agrees that the Work shall be in accordance with the Consulting Engineers' Specification K-851, dated for Contract September 28, 1948, marked Exhibit "B", attached hereto and made a part hereof.

46 (4) Contractor agrees that his Summary of Proposal dated September 28, 1948, marked Exhibit "C", and attached hereto is made a part of this Contract only insofar as it is consistent with the other contract documents.

(5) Contractor agrees to begin erection on or before July 1, 1949, and to complete it on or before October 1, 1949.

(6) It is mutually agreed that if completion of the Work is delayed by any act of Purchaser or other contractor in the employ of Purchaser, by strikes, or by other exceptional conditions over which Contractor has no control, Contractor shall make application in writing for extension of time for completion of the Work. Time for completion of the Work shall be extended by such period as the Consulting Engineers may consider reasonable.

(7) Contractor agrees to co-operate with Purchaser's construction and operating departments in the execution of the Work, and to so conduct the Work, as not to interfere with the operation of the generating station, or with other work being performed therein.

(8) Contractor guarantees that the Work will be of the

best quality and satisfactory to the Consulting Engineers in every particular, and agrees, promptly, and at his own expense, to remedy or replace in conformity with this Contract, any part of the Work which during the first year of actual use in service proves defective.

47 (9) Purchaser, in consideration of the undertakings and guarantees of Contractor and of the faithful accomplishment of the Work, agrees to pay to Contractor an amount (subject to adjustment as provided for under Clause 13, and as set forth on Page 2 of Contractor's Summary of Proposal (Exhibit "C")), to be computed on the basis of the following prices for unloading and erection:

Structural members	$0.035 per pound
Coal bunkers	$0.080 per pound
Riveted steel stacks	$0.080 per pound
Bracing members	$0.035 per pound
Column base plates	$0.035 per pound

The amount to be paid to Contractor for the material to be erected hereunder is estimated by the Consulting Engineers to be Seventy-Nine Thousand One Hundred Fifty Dollars ($79,150.00).

(10) It is mutually agreed that weights of the material to be unloaded and erected hereunder, shall be figured in accordance with the latest edition of the "Code of Practice" of the American Institute of Steel Construction, for steel sold on a unit price basis.

(11) Purchaser agrees to make payments to Contractor from time to time as work is done, provided said work is in accordance with the terms of this Contract, and is shown to be free from liens, but the total sum of such pay-

48 ments on account shall at no time before the completion of the Work exceed Eighty-Five Percent (85%) of the mutually-agreed-upon value of the work done. The final amount due Contractor shall be payable thirty (30) days after the date of completion of the Work, provided

the terms of this Contract have otherwise been complied with at that time.

(12) Contractor agrees to perform without charge other than as provided under Clause 9 any overtime for the Work made necessary by his delays.

(13) Contractor agrees to do any field overtime work authorized by Purchaser for the Work, and to charge for such field overtime work only the actual direct excess wage, insurance and taxes.

In Witness Whereof: The parties hereto have caused this Contract to be signed by their respective officers, thereunto duly authorized.

Herlihy Mid-Continent Company,
By F. J. Herlihy, /s/
Prest.

Attest
H. T. McMaisigal, /s/ (Seal)
Secretary.

Northern Indiana Public Service Company,
By Dean H. Mitchell, /s/
President.

Attest
F. E. Thacker, /s/ (Seal)
Secretary.

Northern Indiana Public Service Co.
F. L. Reinmann, /s/ JOV 5/16/49 /s/
A. Lindeman, /s/ 5/19/49
R. M. Schahfer. /s/

Approved
Sargent & Lundy,
By L. V. Suda.

49-52 General Conditions not printed here as they are printed as part of Exhibit A.

83 **Exhibit E.**

SHORT FORM AGREEMENT.

Form 614-40
Rev. 11-15-37

Michigan City Generating Station
Michigan City, Indiana

This Agreement, Made and entered into this 18th day of November, 1948, by and between the Northern Indiana Public Service Company, an Indiana corporation, party of the first part (hereinafter called the "Company"), and Herlihy Mid-Continent Company of 79 West Monroe Street, Chicago, Illinois, party of the second part (hereinafter called the "Contractor"), Witnesseth:

That for and in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

(1) The Contractor covenants and agrees as follows:

To drive sheet piling along harbor at the Michigan City Generating Station between plant intake and Pullman Pumping Station, in accordance with specifications to be furnished.

Amount of piling to be driven estimated to be 350 lineal feet.

(2) That all materials furnished hereunder shall be the very best of the respective kinds and the said work shall be done in a first class workmanlike manner and to the satisfaction of the Company.

(3) To guarantee and pay to each and every one of the employees of the Contractor, and to the dependents of such employees, engaged or employed upon or in and about the work done by said Contractor under this agreement, compensation provided for in and by any Workmen's Compensation Laws, Workmen's Occupational Diseases Acts or Employer's Liability Acts applicable; and to insure and keep insured his liability to pay compensation under such Workmen's Compensation Laws, Workmen's Occupational

Diseases Acts or Employer's Liability Acts in some company or association authorized to insure liability to pay compensation under said laws and to deliver a certified copy or copies of said insurance policy to the Company upon request.

(4) The contractor shall obtain, and keep in force during the term of this contract, and the performance of the work hereunder, a certificate from the Industrial Board of the State of Indiana showing that the contractor has complied with Sections 5, 68 and 69 of the Indiana Workmen's Compensation Act and paragraphs (a), (b) and (c) of Section 27 of The Indiana Workmen's Occupational Diseases Act, and shall forthwith deliver to the Owner copies of said certificates. Said Contractor shall pay all compensation, physician's fees, hospital fees, nurses charges, and burial expenses on account of the injury or death of any employee of such Contractor, arising out of and/or in the course of the performance of the work covered by this contract as required by The Indiana Workmen's Compensation Act, The Indiana Workmen's Occupational Diseases Act, or any Workmen's Compensation Act, Workmen's Occupational Diseases Act, or Employer's Liability Law applicable, and shall indemnify and save harmless the Owner from any and all liability to pay the same.

(5) To defend any and all suits brought against the Company by any employee or other person (whether employed by the Contractor or not) for damages alleged or claimed to have been caused by or through the work done by the Contractor under this agreement, and to indemnify and save harmless the Company from and against all claim or claims arising out of the work done by the Contractor; also to pay, liquidate and discharge any and all claims or demands for injury, loss or damage to any and all persons or property caused by, growing out of, or incidental to the work done by the Contractor under this agreement, including all claims for damages for the obstruction to private driveways, streets and alleys, and including all

costs of suits and reasonable attorney's fees. In the event of any accident or claim the Contractor shall give immediate notice to the Company. The Contractor further agrees to take out and maintain indemnifying insurance satisfactory to the Company, the policy or certified copy or copies thereof to be delivered to the Company upon request.

(6) To start upon said work on the 25th day of November, 1948 and to complete same on or before the 1st day of June, 1949.

(7) The Company covenants and agrees to pay the Contractor for all of said work materials and labor, upon receipt of an itemized invoice, for sum of Cost plus 4% Dollars ($) as follows: Upon completion of the work and the furnishing to the Company of satisfactory evidence that the same is free and clear of all mechanic's and other liens and the possibility thereof.

(8) This agreement shall not be binding upon the Company until the approval of the President or a Vice President of the Company is written hereon and attested by the Secretary or an Assistant Secretary.

In Witness Whereof, the parties hereto have hereunto set their hands and seal the day and year first above written.

Approved.

November 29, 1948.

Herlihy Mid-Continent Company,
By F. J. Herlihy,
President.

By H. T. McMaisigal,
Secretary.

Northern Indiana Public Service Company,
By E. D. Anderson,
Its Vice President.

Attest:
By J. E. Fasan,
Its Assistant Secretary.

84 UNITED STATES DISTRICT COURT.
* * (Caption—1446) * *

(Filed Dec. 9, 1952. Kenneth Lackey, Clerk.)

We enter our security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the plaintiff of any cost ordered or adjudged to be paid by it, we hereby agree and stipulate that execution may issue against our property for all costs not exceeding two hundred dollars taxed against plaintiff.

Dated this 8th day of December, A. D. 1952.

Glens Falls Indemnity Company. (Seal)
By (Signature illegible),
Attorney.

Chicago, Illinois.

Acknowledged before me this 8th day of December, 1952.

Ellinor Bang,
(Seal) *Notary Public.*

Endorsed: United States District Court. * * (Caption—1446) * *. Security for Costs.

84¼ UNITED STATES DISTRICT COURT.

* * (Caption—1446) * *

(Filed Dec. 12, 1952. Kenneth Lackey, Clerk.)

The undersigned, having been duly admitted to practice in the said Court, hereby enter Appearance for Northern Indiana Public Service Company, an Indiana corporation, in the above-entitled cause.

Edwin H. Friedrich,
Friedrich, Petrie & Tweedle,
Attorneys.

Address:
300 Hammond Building,
Hammond, Indiana,
Telephone—Sheffield 119.

85 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1446) * *

SUMMONS.

(Filed Dec. 17, 1952. Kenneth Lackey, Clerk.)

To the above named Defendant: Northern Indiana Public Service Co., an Indiana corp., Hammond, Indiana.

You are hereby summoned and required to serve upon Nash, Ahern & McNally, plaintiff's attorneys, whose address is 111 West Washington Street, Chicago 2, Illinois, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Kenneth Lackey,
Clerk of Court.
By Jean Erickson,
Deputy Clerk.

(Seal of Court)

Date: 12/6/52.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ.

I hereby certify and return, that on the 10th day of December, 1952, I received the within summons and executed the same on the within named Northern Indiana Public Service Company, an Indiana corporation, Hammond, Indiana, Defendant, by leaving a true copy of the Summons for the said corporation with Mr. F. E. Thacker, Treasurer, Northern Indiana Public Service Company, Hammond, Indiana. Served this 11th day of December, 1952, in the offices of the above named corporation at Hammond, Indiana.

Eugene J. Pajakowski,
United States Marshal.
By Robert J. Curtin, Jr.,
Deputy United States Marshal.

Marshal's Fees.

Travel	$.....
Service 1	$ 2.00
	$ 2.00

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Endorsed: District Court of the United States. * * (Caption—1446) * *. Summons in Civil Action. Returnable not later than 20 days after service.

86 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—1446) • •

STIPULATION.

(Filed Dec. 23, 1952. Kenneth Lackey, Clerk.)

It is hereby stipulated and agreed by the respective parties, plaintiff and defendant, through their counsel, that the defendant shall have additional time to and including January 23rd, 1953, in which to plead.

Nash, Ahern & McNally,
Attorneys for Plaintiff.

Edwin H. Friedrich,
Friedrich, Petrie & Tweedle,
Attorneys for Defendant.

Approved:
Luther M. Swygert,
Judge of the United States District Court for the Northern District of Indiana—Hammond Division.

December 23, 1952.
Fort Wayne, Indiana.

87 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—1446) • •

STIPULATION.

(Filed Jan. 15, 1953. Kenneth Lackey, Clerk.)

It is hereby stipulated and agreed by the respective parties, plaintiff and defendant, through their counsel, that the defendant shall have additional time to and including February 2, 1953, in which to plead.

Nash, Ahern & McNally,
Attorneys for Plaintiff.
E. H. Friedrich,
Friedrich, Petrie & Tweedle,
Attorneys for Defendant.

Approved:
Luther M. Swygert,
Judge of the United States District Court for the Northern District of Indiana—Hammond Division.
January 16, 1953.

88 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

APPOINTMENT OF LOCAL COUNSEL.

(Filed Jan. 27, 1953. Kenneth Lackey, Clerk.)

Comes now Nash, Ahern and McNally, Attorneys for the plaintiff in this cause and now appoint William S. Spangler of the firm of Spangler and Jennings, 31 E. Fifth Avenue, Gary, Indiana, as local counsel in this cause, to receive all notices, orders, papers and documents which may be served herein.

Nash, Ahern and McNally,
By Martin J. McNally,
Counsel for Plaintiff.

89 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

PROOF OF SERVICE.

(Filed Jan. 28, 1953. Kenneth Lackey, Clerk.)

Edwin H. Friedrich, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the defendant in the above entitled cause and makes this affidavit for and on behalf of said defendant as he is authorized to do; that he caused a copy of the above and foregoing motion to dismiss to be served upon William S. Spangler, of the firm of Spangler and Jennings, as local counsel for the plaintiff in this cause, by mailing a copy to him addressed to his office in the City of Gary, Lake County, Indiana, postage prepaid, at 31 East Fifth Avenue, this 28th day of January, 1953.

And further affiant saith not.

Edwin H. Friedrich.

Subscribed and sworn to before me this 28th day of January, 1953.

(Seal) Flora M. Lembke,
Notary Public.

My commission expires May 30th, 1956.

90 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

MOTION TO DISMISS.

(Filed Jan. 28, 1953. Kenneth Lackey, Clerk.)

The defendant moves the court to dismiss the complaint herein upon the ground that said complaint and each paragraph thereof fails to state a cause of action upon which any relief can be granted against the defendant.

Count I of the complaint is insufficient for each and all of the following reasons and grounds, to-wit:

(1) The Indiana Gross Income Tax is not a part of the "net cost of the work", as specified in the contracts.

(2) The Indiana Gross Income Tax is a tax upon the privilege of receiving income in the State of Indiana from any source and therefore is not a part of the work specified to be accomplished under the terms of the contracts sued on.

(3) The Indiana Gross Income Tax is not an expense chargeable to the work under the specific terms of the contracts. The contracts afford no basis for recovery of this payment of tax.

(4) The terms of the contracts exclude the Indi-91 ana Gross Income Tax as part of the cost allowable to the work.

(5) Under the terms of the contracts the word "taxes" does not include the Indiana Gross Income Tax but on the contrary excludes such tax. The contracts must be construed as a whole and each part harmonized with the other. When this is done the Indiana Gross Income Tax is not included. Therefore no cause of action for its recovery exists.

Count II of the complaint is insufficient for each and all of the following reasons and grounds, to-wit:

The defendant incorporates herein by reference, without stating them, each of the grounds (1) to (5), both inclusive, as set forth under Count I.

(6) The contracts set forth do not admit of "custom and usage" to prove the Indiana Gross Income Tax to be included under the terms of the contracts.

(7) Custom and usage cannot legally be proved to alter, amend, vary or contradict the plain, unambiguous language of the contracts sued on. The alleged custom and usage cannot be relied on to make the legal rights of the parties hereto other than as expressed by the plain terms of the contracts themselves.

(8) The custom and usage as alleged in the complaint permits the contracts to be altered, varied and contradicted by a presumption and implication without any positive expression of intention of the parties. The plain letter of the contracts cannot be varied or contradicted by parol evidence.

(9) The language and terms of the contracts sued on require no explanation or qualification. They clearly set forth the intent of the contracting parties, and the parties must be presumed to have intended what they said.

92 Count III of the complaint is insufficient for each and all of the following reasons and grounds, to-wit:

The defendant incorporates herein by reference as a part hereof, each of the reasons (1) to (5) set forth under Count I, without restating them, and also each of the reasons (6) to (9), both inclusive, set forth under Count II, without restating them.

(10) Under the contracts the term "cost plus four percent" does not include the Indiana Gross Income Tax because such tax is not a part of the cost of the work under the allegations of the complaint and the exhibits attached thereto.

(11) An examination of the contracts proves that the

parties intended that the Indiana Gross Income Tax was not to be included as part of the cost of the work or allowable and chargeable to the work.

Edwin H. Friedrich,
Friedrich, Petrie & Tweedle,
Attorneys for Defendant.

The defendant requests oral argument on the foregoing motion.

137 THE UNITED STATES DISTRICT COURT.
(Caption—1446)

ORDER.

(Filed Apr. 12, 1955. Kenneth Lackey, Clerk.)

The motion to dismiss filed by the defendant having been heard on oral arguments on March 30, 1955, and the Court having considered said arguments and the briefs filed in connection with said motion, the determination of the motion to dismiss is now deferred until the trial.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
April 12, 1955.

138 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—1446)

PROOF OF SERVICE.

(Filed May 2, 1955. Kenneth Lackey, Clerk.)

Edwin H. Friedrich, being first duly sworn on oath, deposes and says: that he is the attorney of record for the defendant in the above entitled cause of action; that the answer of the defendant in this action to be filed May 2nd, 1955, as per stipulation with the attorneys for the plaintiff, was duly served on the attorneys of record for the plaintiff in this cause by mailing a copy of said answer by depositing the same in the United States mail on April 30th, 1955, postage prepaid, to Messrs. Nash, Ahern & McNally, Attorneys at Law, 111 West Washington Street, Chicago 2, Illinois.

And further affiant saith not.

Edwin H. Friedrich.

Subscribed and sworn to before me this 30th day of April, 1955.

Flora M. Lembke,
Notary Public.

(Seal)

My commission expires May 30th, 1956.

139 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1446) * *

ANSWER.

(Filed May 2, 1955. Kenneth Lackey, Clerk.)

The defendant, for answer to the several counts in plaintiff's complaint, alleges as follows:

Count I.

(1) The defendant admits the allegations of paragraph 1.

(2) The defendant admits the execution of the contract identified as Exhibit "A" to the complaint, but says that it executed the same at Hammond, Indiana.

(3) The defendant admits the execution of the contract identified as Exhibit "B" to the complaint but says that it executed the same at Hammond, Indiana.

(4) The defendant admits the payments under the contracts as set out in paragraph 4.

(5) The defendant admits the execution of extra order identified as Exhibit "C" to the complaint and the payments made thereunder.

(6) The defendant denies the allegations con-
140 tained in paragraphs 6, 7, 8 and 9.

Wherefore, the defendant prays that the plaintiff take nothing by Count I of said complaint and that the defendant recover its costs herein.

Count II.

The defendant adopts by reference its answer to Count I of said complaint as its answer to Count II of said complaint. In addition thereto it alleges as follows:

(1) The defendant admits that it has always contended

and does now contend that it is not liable to the plaintiff under any contract sued on in this action or extra orders under said contracts for Indiana Gross Income Tax paid by the plaintiff. It denies all other allegations contained in paragraph 2, and denies all allegations in paragraph 3 of Count II of the complaint.

Wherefore, the defendant prays that the plaintiff take nothing by Count II of said complaint and that the defendant recover its costs herein.

Count III.

(1) The defendant admits the execution of contract "K 851", identified in Count III of the complaint as Exhibit "D".

(2) The defendant admits the execution of the agreement identified as Exhibit "E" to Count III of the complaint.

(3) The defendant denies all other allegations contained in paragraphs 2, 3, 4, 5, 6, 7 and 8 of Count III of the complaint.

Wherefore, the defendant prays that the plaintiff take nothing by its complaint, and that the defendant recover its costs herein.

Friedrich, Petrie & Tweedle,
E. H. Friedrich,
Attorneys for Defendant.

141-142 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

DOCKET ENTRY.

This cause having been set for trial on September 29, 1955, counsel for all parties appear at hearing for continuance of trial. Defendant asks for continuance, plaintiff not consenting to said request, the Court grants said request for continuance. Cause continued beyond September 29, 1955, until further order of court.

Entered:
September 22, 1955,
Hammond, Indiana.

143 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

ADMISSIONS OF DEFENDANT IN RESPONSE TO PLAINTIFF'S REQUEST THEREFOR.

(Filed Sep. 26, 1955 Kenneth Lackey, Clerk.)

The defendant, in response to plaintiff's request for admissions under Rule 36 of the Federal Rules of Civil Procedure, does hereby within the time specified by said rules and under the terms and conditions thereof, reserving all questions of admissibility, state as follows:

(1) The defendant admits that Regulation 404 of the official regulations promulgated by the Gross Income Tax Division of the State of Indiana in force and effect as stated in plaintiff's request is as follows:

Reg. 404. Passing the Tax On.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a

matter of contractual agreement between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts.

Since taxpayers are not made the agents of the State to collect gross income tax, any amount added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a
143½ part of the gross receipts of a taxpayer and must be reported as taxable income.

(2) The defendant admits that the contracts attached to the complaint and identified as Exhibits A, B, C, D and E were prepared by Sargent & Lundy, consulting engineers for the defendant under special employment as specifically set forth under Item 5 hereof.

(3) The defendant admits receiving a letter from the plaintiff dated April 30th, 1952, a copy of which is attached as Exhibit A to plaintiff's request.

(4) The defendant admits receiving a letter from the plaintiff dated January 3rd, 1950, a copy of which is attached as Exhibit B to plaintiff's request.

(5) The defendant admits that the firm of Sargent & Lundy was employed as consulting engineers on the construction project at Michigan City, Indiana. Such employment was made by three separate contracts, copies of which are attached and made a part hereof. The defendant admits Sargent & Lundy's status was that of "independent contractor" to furnish special engineering services, but not as any general agent. The defendant admits that the firm of Sargent & Lundy were engineers and not lawyers and had no authority to construe any contract or to pass on any legal question.

Friedrich, Petrie & Tweedle,
Lawyer & Anderson,
Attorneys for Defendant.

144 (Letter head of Sargent & Lundy,
Chicago 3, Illinois.)

Service Agreement No. 1109
February 26, 1947

Northern Indiana Public Service Company
500 Broadway
Gary, Indiana

Gentlemen:

We present the following as the basis on which we would furnish you Engineering Services in connection with the Installation of Turbine Generator Unit (Unit #2) in your Michigan City Power Station, including Steam Generating Units, and all required Mechanical and Electrical Auxiliary Equipment up to the low tension side of the step-up power transformers.

Services:

We shall furnish our usual complete Engineering Service, which includes architectural and engineering design, preparation of studies, estimates, drawings, specifications and contracts, recommendations for and assistance in obtaining prices and in the letting of contracts, the issuing of engineers' certificates approving payments to contractors, and assistance in putting the Project into actual operation.

Compensation for Services:

Compensation for Services shall consist of "Current Expense Charges" and a "Percentage of Cost Charge," and shall be determined, billed, and paid as follows:

A. Current Expense Charges:

1. Engineering and Drafting—at actual salary and wages plus fifty per cent (50%).

2. Stenographic and Clerical Services—at actual wages.

3. Traveling Expenses, including transportation,
145 room, board, etc.,—at charged cost to Sargent & Lundy.

4. Miscellaneous Expenses, including telegraph, long-distance telephone, blue prints, etc.,—at charged cost to Sargent & Lundy.

"Current Expense Charges" shall be billed and paid monthly as the Project progresses.

B. Percentage of Cost Charge:

This charge shall be two per cent (2%) of the cost of the Project to completion (exclusive of Sargent & Lundy's charges and your own engineering and supervisory costs, and land, interest, and overhead costs).

The "Percentage of Cost Charge" shall be billed and paid in installments as follows:

20%—When Sargent & Lundy's Services are Ordered.
60%—In equal monthly installments: the number of installments to be in accordance with the mutually-agreed-upon estimate of the number of months required to complete the Project.
20%—When the Project has been completed for use or operation.

All except the final installment of the "Percentage of Cost Charge" shall be billed and paid on the basis of the mutually-agreed-upon estimate of the cost of the Project to completion, and the final installment on the basis of the balance adjustment between the estimated cost and the actual cost.

Should you so require, we should also be pleased to furnish a Field Engineer to supervise the construction and installation work, on the basis of actual salary, plus ten per cent (10%) plus traveling, and Field expenses.

146 Should you find these terms to be in accordance with our mutual understanding, please accept this agree-

ment by signing the enclosed blue copy as provided and return it to us for our files.

Yours very truly,
Sargent & Lundy,
By C. F. Sargent,
Partner.

CFS:CLD

Accepted (Date) April 10, 1947.
Northern Indiana Public Service Company,
By D. L. Bement,
Title.

147 (Letterhead of Sargent & Lundy,
Chicago 3, Illinois.)

Service Agreement No. 1120
April 24, 1947

Northern Indiana Public Service Company
500 Broadway
Gary, Indiana

Gentlemen:

We present the following as the basis on which we would furnish you Engineering Services in connection with the new 138 kv Outdoor Substation for Unit No. 2, your Michigan City Generating Station:

Services:

We shall furnish our usual complete Engineering Service, which includes architectural and engineering design, preparation of studies, estimates, drawings, specifications and contracts, recommendations for and assistance in obtaining prices and in the letting of contracts, the issuing of engineers' certificates approving payments to contrac-

ors, and assistance in putting the Project into actual op-
eration.

Compensation for Services:

Compensation for Services shall consist of "Current Expense Charges" and a "Percentage of Cost Charge," and shall be determined, billed, and paid as follows:

A. Current Expense Charges:

1. Engineering and Drafting—at actual salary and wages plus fifty per cent (50%).

2. Stenographic and Clerical Services—at actual wages.

3. Traveling Expenses, including transportation,
148 room, board, etc.,—at charged cost to Sargent & Lundy.

4. Miscellaneous Expenses, including telegraph, long-distance telephone, blue prints, etc.,—at charged cost to Sargent & Lundy.

"Current Expense Charges" shall be billed and paid monthly as the Project progresses.

B. Percentage of Cost Charge:

This charge shall be one and one-half per cent (1½%) of the cost of the Project to completion (exclusive of Sargent & Lundy's charges and your own engineering and supervisory costs, and land, interest, and overhead costs).

The "Percentage of Cost Charge" shall be billed and paid in installments as follows:

20%—When Sargent & Lundy's Services are Ordered.
60%—In equal monthly installments: the number of installments to be in accordance with the mutually-agreed-upon estimate of the number of months required to complete the Project.
20%—When the Project has been completed for use or operation.

All except the final installment of the "Percentage of Cost Charge" shall be billed and paid on the basis of the mutually-agreed-upon estimate of the cost of

the Project to completion, and the final installment on the basis of the balance adjustment between the estimated cost and the actual cost.

Should you so require, we should also be pleased to
149 furnish a Field Engineer to supervise the construction and installation work, on the basis of actual salary, plus ten per cent (10%) plus traveling, and Field Expenses.

Should you find these terms to be in accordance with our mutual understanding, please accept this agreement by signing the enclosed blue copy as provided and return it to us for our files.

Yours very truly,
Sargent & Lundy,
By C. F. Sargent,
Partner.

CFS:CLD

Accepted (Date) 15 May 1947.
Northern Indiana Public Service Company,
By D. L. Bement,
Title VP.

150 (Letter head of Sargent & Lundy,
Chicago 3, Illinois.)

Service Agreement No. 1133
February 9, 1948

Northern Indiana Public Service Company
500 Broadway
Gary, Indiana

Gentlemen:

We present the following as the basis on which we would furnish you Engineering Services in connection with the Installation of Unit No. 3 in your Michigan City Power Station, including Turbine Generator Unit, Steam Generating Unit or Units, and all required Mechanical and Electrical Auxiliary Equipment and the Outdoor Substation.

Services:

We shall furnish our usual complete Engineering Service, which includes architectural and engineering design, preparation of studies, estimates, drawings, specifications and contracts, recommendations for and assistance in obtaining prices and in the letting of contracts, the issuing of engineers' certificates approving payment to contractors, and assistance in putting the Project into actual operation.

Compensation for Services:

Compensation for Services shall consist of "Current Expense Charges" and "Percentage of Cost Charges," and shall be determined, billed, and paid as follows:

A. Current Expense Charges:

1. Engineering and Drafting—at actual salary and wages plus fifty per cent (50%).

2. Stenographic and Clerical Services—at actual wages.

3. Traveling Expenses, including transportation,
151 room, board, etc.,—at charged cost to Sargent & Lundy.

4. Miscellaneous Expenses, including telegraph, long-distance telephone, blue prints, etc.,—at charged cost to Sargent & Lundy.

"Current Expense Charges" shall be billed and paid monthly as the Project progresses.

B. Percentage of Cost Charges:

These charges shall be two per cent (2%) of the cost of the Project to completion, not including the Outdoor Substation, and one and one-half per cent (1½%) of the cost of the Outdoor Substation to completion (exclusive of Sargent & Lundy's charges and your own engineering and supervisory costs, and land, interest, and overhead costs).

The "Percentage of Cost Charges" shall be billed and paid in installments as follows:

90%—In equal monthly installments: the number of installments to be in accordance with the mutually-agreed-upon estimate of the number of months required to complete the Project.

10%—When the Project has been completed for use or operation.

All except the final installment of the "Percentage of Cost Charges" shall be billed and paid on the basis of the mutually-agreed-upon estimate of the cost of the Project to completion, and the final installment on the basis of the balance adjustment between the estimated cost and actual cost.

Should you so require, we should also be pleased to
152 furnish a Field Engineer to supervise the construction and installation work, on the basis of actual salary, plus ten per cent (10%) plus traveling, and Field expenses.

Should you find these terms to be in accordance with

ur mutual understanding, please accept this agreement y signing the enclosed blue copy as provided and return t to us for our files.

Yours very truly,
Sargent & Lundy,
By C. F. Sargent,
Partner.

CFS:cld
Accepted (Date) 2/28/48.
Northern Indiana Public Service Company,
By D. L. Bement,
Title Vice President.

Approved:
Lawyer and Anderson,
By John C. Lawyer.

153 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—1446) * *

PROOF OF SERVICE.

(Filed Sep. 26, 1955. Kenneth Lackey, Clerk.)

Edwin H. Friedrich, being first duly sworn on oath, deposes and says: that he served the foregoing Admissions of Defendant in Response to Plaintiff's Request therefor, and exhibits attached thereto, by mailing a copy of said Admissions and exhibits in an envelope addressed to Messrs. Nash, Ahern & McNally, 111 West Washington Street, Chicago 2, Illinois, bearing proper postage prepaid, on the 26th day of September, 1955, at the post-office in Hammond, Indiana.

Edwin H. Friedrich.

Subscribed and sworn to before me this 26th day of September, 1955.

Flora M. Lembke,
Notary Public.

(Seal)

My commission expires May 30th, 1956.

154 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

(Filed Oct. 16, 1955. Kenneth Lackey, Clerk.)

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, at Hammond, Indiana, commencing Monday, February 20, 1956, at 10 o'clock A. M.

Appearances:

Nash, Ahern & McNally, of Chicago, Illinois, by Martin J. McNally, Esq., Thomas D. Nash, Jr., Esq., representing the plaintiff;

2 Friedrich, Petrie & Tweedle, of Hammond, Indiana, by Edwin H. Friedrich, Esq., Lawyer & Anderson, of Hammond, Indiana, by R. Stanley Anderson, Esq., representing the defendant.

The Court: Are you ready to proceed in this matter, Mr. McNally?

Mr. McNally: Yes, your Honor, I am.

The Court: Are you ready, Mr. Friedrich?

Mr. Friedrich: Yes, I am.

Mr. McNally: I want to move, at the opening of the case, your Honor, to dismiss the allegations pertaining to custom and usage, particularly Count II of the complaint.

Mr. Friedrich: Under III there are certain allegations.

Mr. McNally: I am going to get to that.

The Court: I have sent for the file.

Mr. McNally: Do you want me to wait?

The Court: You may proceed, Mr. McNally.

Mr. McNally: As to Count III, I wish to dismiss

3 all allegations concerning custom and usage.

The Court: Count II is dismissed in its entirety?

Mr. McNally: In its entirety.

As to Count III, all allegations of custom and usage and all allegations with respect to the contract identified in the plaintiff's complaint as Exhibit "E," because that is founded solely on custom and usage.

The Court: Any objection, Mr. Friedrich?

Mr. Friedrich: No, your Honor.

The Court: Granted.

And thereupon the plaintiff, to support and maintain the issues on its behalf, introduced the following evidence.

Mr. McNally: Mr. McMeen, will you take the stand?

WALTER H. McMEEN, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. McNally.

Q. Will you state your full name and residence to the Court, please?

A. Harry H. McMeen, 1028 Western Avenue, Flossmoor, Illinois.

Q. What is your profession?

A. Engineer.

Q. With what engineering firm are you associated, and in what capacity?

A. Sargent & Lundy: a partner.

Q. You were subpoenaed by the plaintiff in this case, were you not, served a subpoena duces tecum issued by the clerk of this court?

A. Yes.

Mr. McNally: I called Mr. McMeen under Rule 43(b) as managing agent.

The Court: Any objection, that he be questioned in that capacity?

Mr. Friedrich: No.

By Mr. McNally:

Q. How long have you been associated with Sargent & Lundy?

A. Since 1929.

Q. You were the project engineer for Sargent & Lundy on the construction work of the Northern Indiana Public Service Company's generating plant on Lake Michi-
5 gan near Michigan City, west of the harbor, were you not?

A. Yes, sir.

Q. That is the construction work that is involved in this suit; you understand that?

A. Yes, sir.

Q. The firm of Sargent & Lundy was employed by the Northern Indiana Public Service Company to render the architectural and engineering services for such construction work, was it not?

A. Yes, sir.

Q. The duties and authority of Sargent & Lundy as to such construction work included preparing the architectural and engineering design, the specifications for the work, and preparing and letting of contract to general contractors to do the work, and issuing certificates for payments to such contractors; is that not true?

A. Except for the letting of contracts.

Q. Is it your position that the duties and authority of Sargent & Lundy did not pertain to the letting of contracts?

A. Yes, sir.

Q. To refresh your recollection, Mr. McMeen, I
6 show you a photostatic copy of your contract, that is, the contract of Sargent & Lundy with Northern Indiana Public Service Company, which was furnished by Northern Indiana Public Service Company as the defendant in this case under a notice to admit served upon the defendant's counsel, and ask you to look at the language

in the second paragraph under "Services," and to state whether the letting of contracts is not included in the services to be performed by you.

A. For assistance.

Q. By that, you mean that the contracts were actually signed by the Northern Indiana Public Service Company, and not by Sargent & Lundy?

A. Yes, sir.

Q. One of the general contractors who submitted bids for certain of such construction work, and I am referring to the same construction work that I previously identified, was Herlihy Mid-Continent Company, of Chicago, the plaintiff in this case, was it not?

A. Yes, sir.

Q. Herlihy Mid-Continent Company, the plaintiff, prior to bidding on construction work, on such construction
7 work, for the Northern Indiana Public Service Company, had done construction work on jobs for which Sargent & Lundy had acted as engineers; is that correct?

A. Yes, sir.

Q. One of the jobs in the State of Indiana on which Sargent & Lundy acted as engineers and Herlihy Mid-Continent Company had done and was doing some of the construction work was the Chicago District Electric Generating Corporation's State Line Station contract; do you recall that?

A. Yes, sir.

Q. There were others where Sargent & Lundy over a period of years had acted as the engineers and where Herlihy Mid-Continent Company was the general contractor; is that correct?

A. Yes, sir.

Q. You therefore, Mr. McMeen, were familiar with Herlihy Mid-Continent Company, its offices, operations, and facilities, were you not?

A. Yes, sir.

Q. And you were so familiar at the time that you received the first bid from Herlihy Mid-Continent Com-
8 pany on this construction work that is involved in this case for the Northern Indiana Public Service Company, were you not?

A. Yes, sir.

Q. Herlihy Mid-Continent Company's bid submitted to you was pursuant to the proposal prepared by Sargent & Lundy; is that correct?

A. Well, I don't—

Q. Well, before the bids were received from any contractor, Sargent & Lundy had prepared proposals on what the construction work was; is that correct?

A. Specifications.

Q. Specifications?

A. Yes, sir.

Q. And those specifications outlined the work to be done?

A. Yes, sir.

Q. And under what conditions it should be done?

A. Yes, sir.

Q. Herlihy's bid for contract K-814 was approved and that contract awarded to Herlihy Mid-Continent Company, was it not?

A. Yes, sir.

Q. And that contract is dated August 13, 1948.
9 It also was, pursuant to its bid, awarded contract K-825, and the contract is dated October 19, 1948; is that correct?

A. I think it is.

Q. Subsequently, on August 15, 1948, Herlihy was awarded a contract for extra work under extra order No. 1 to contract K-825; is that correct?

A. Yes, sir.

Q. And Herlihy later was also awarded contract K-851; is that correct?

A. Yes, sir.

Q. One of the jobs that the Herlihy had been and was working on at the time these bids were submitted for the Northern Indiana job involved in this case was the one I previously identified and you agreed to as the State Line Station job of Chicago District Electric Generating Corporation; is that correct?

A. Yes, sir.

Q. And you had rendered the same services in connection with that State Line Station job as you were rendering and would continue to render on the Northern Indiana Public Service Company job?

Mr. Friedrich: To which we object, your Honor, for the reason that it has no probative value; it is immaterial and irrelevant.

Mr. McNally: I think we will be able to connect it up.

Mr. Friedrich: It is a contract with State Line Generating Company, an entirely different corporation than Northern Indiana, and a contract, from all that appears in the evidence, that might be for entirely different work. Anyway, the conditions under a contract with another corporation have no probative value in any proof under any of the contracts in this case; and therefore it is immaterial and irrelevant.

The Court: You say you are going to connect it up?

Mr. McNally: Yes. There is no jury.

The Court: While, of course, I want to hear all objections, and I want to consider them and rule on them, certainly not prejudge them, but I do feel, because of the fact it is tried before the Court, that I am going to consider that factor, also, and, in view of counsel's statement, the objection is overruled.

11 By Mr. McNally:

Q. Just to refresh your recollection on the State Line job, the fact is, under the "cost plus" contracts under which Herlihy was doing work on the State Line job, he was billing and was being paid the Indiana Gross Income tax for which Herlihy Mid-Continent Company was liable; is that correct?

Mr. Friedrich: We renew the objection to that, your Honor.

The Court: Well, unless there is some legal basis for considering other contracts, and it is hooked up with this, of course I don't see how it can be relevant, but on the basis of your statement that it can be hooked up factually, or legally, or both, I am going to overrule the objection.

Mr. Friedrich: I just wanted to add, as part of the objection I made before, the additional reason that counsel is now attempting to prove the provisions of a separate contract by the language of it, which it is not proper to do. That is, the plaintiff's and defendant's rights arise under a particular contract between them, between the

12 plaintiff and defendant, and the provisions of another contract between different parties, to which the defendant is not a party, have no probative value or place in this case.

The Court: Perhaps I should hear your basis.

Mr. McNally: The thing to be determined by the Court in this case, of course, is the intention of the parties. Apparently, at least from the standpoint of the respective positions of the plaintiff and defendant, there is some uncertainty as to what the disputed clause in the contract means. Under those circumstances, the Court under the law must receive in evidence the circumstances surrounding the execution of the contract.

Reading from Corpus Juris Secundum, Volume 17, on the subject of Contracts, at page 744, it is stated:

"In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it may and should be construed in the light of the circumstances surrounding them at the time
13 it is made,"—

"Them" referring to the parties.

In support of that, your Honor, in Corpus Juris Secundum are innumerable federal cases, including decisions of the Supreme Court of the United States, cases from thirty-two states of the Union, including the State of Indiana, and that case in Indiana is *Washington Township Board of Finance* v. *American Surety Company of New York*, 183 N. E. 492.

And going on with the citation:

"• • • it being the right and duty of the court to place itself as nearly as may be in the situation of the parties at the time so as to view the circumstances as they viewed them and so to judge of the meaning of the words and the correct application of the contract."

Now, there are a number of cases all over the Union in support of that.

As a general rule, in case of ambiguity a contract is given that meaning which a party knew or had reason to know was in accordance with the understanding of the other party.

14 Now, here it is admitted by the pleadings that these contracts were drawn by the defendant's agent, and of course that is clear, will be clear, from Mr. McNeen's testimony. Having in mind that they drew the contract, the rule is firm in Indiana that it will be construed most strongly against them. That is very specifically stated in *Noblesville Milling Co.* v. *Johnson*, an Indiana Appellate Court case, 65 N. E. 2d 250, at page 255, where the court said:

"But if there remains any doubt as to the meaning of

this provision of the contract, it must be resolved in favor of the appellee under the well known and universally recognized rule that where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises." Citing numerous Indiana cases and Corpus Juris.

Now, the application of those rules of construction is this: Sargent & Lundy had been engineers on projects preceding the job of construction involved in this
15 case under "cost plus" contracts, which is the type of contract involved here. Sargent and Lundy were approving payments of bills to Herlihy Mid-Continent Company for the Indiana Gross Income tax which the Herlihy Mid-Continent Company on these other jobs in Indiana was liable under the state law to pay.

In view of the language of the disputed clause in this contract, which I say isn't ambiguous, but they say it means one thing and I say it means another, it is provided that as part of its costs, for which it will be reimbursed, the plaintiff, Herlihy Mid-Continent Company, will receive all federal, state, and local taxes applicable to the work. This proof, with other proof, will show that certainly Herlihy Mid-Continent Company intended, at the time these contracts were executed, that it would be repaid the Indiana Gross Income Tax, and this circumstance, of the State Line contract, beginning prior and running up to and beyond the execution of the contracts involved in this case, where, under a similar type of contract,
16 Herlihy was getting the Indiana Gross Income Tax, certainly led him to believe that he would get it under the contracts that are involved in this case.

Now, that certainly is a circumstance, I think, which surrounded the execution of the contracts that are involved in the case.

The Court: May I ask you two questions?

One is, is it your position, regardless of the change in principal, that there was a different principal involved in the State Line Generating Plant contract, as distinguished from the one in question here, that is, that the agent, Sargent & Lundy, was acting for different principals, that that makes no difference?

Mr. McNally: I think, frankly, it makes a difference; it would strengthen my purpose; but I still think it is a circumstance, even though the principal in the State Line case was different from the principal in this case. Both principals had the same agent, and the agent had pursued a course of dealing with Herlihy Mid-Continent and
17 others which indicated to Herlihy that he was going to be repaid what we are seeking in this suit.

The Court: The other question I wanted to ask, and it is subsidiary, you have asked presently only the action taken, or the result, how they treated the contract. Do you intend to submit in evidence the contract itself that was involved in the other case?

Mr. McNally: Well, I will; I have it here.

The Court: Well, I am going to sustain the objection unless the basis of that payment or the lack of it is in evidence.

Mr. Friedrich: Well, so that our position will be clear to the Court, Sargent & Lundy, as we see it, were in no sense an agent of Northern Indiana Public Service Company. The admission here, and the proof here, and as far as the proof can go, is that they were engineers, or project engineers. As far as Northern Indiana was concerned, Sargent & Lundy were independent contractors.

Now, then, this is not a "cost plus" contract. An
18 examination of the contracts which are attached as exhibits to the complaint, upon which this action is founded, will show that they are fixed fee contracts. There is manifestly a difference between them.

Thirdly, the contracts that are sued on in this action are clear and unambiguous, when read in the light of the Indiana law, which is the only law that can apply to them. There is nothing to explain.

Again, if we open the door to a contract between State Line Generating and Herlihy, to which Northern Indiana is not a party, you would have the same right to have a contract between United States Steel and Herlihy, or Inland and any other contractor.

We have always taken the position that this question of the payment of the Indiana Gross Income Tax was a matter of contract between the parties. Now, certainly, Northern Indiana can't be bound by a contract that State Line Generating made, any more than it could be bound by a contract that U. S. Steel made, or Inland.

19 Mr. McNally: I don't claim that it is bound; that's not the point; it's the course of—

The Court: I think I understand both of your positions, and I want to say now that the legal questions that are involved as to the materiality of this evidence are not determined by its admission. The ruling is based with that reservation and because of the fact in this particular instance there was the same agent or independent contractor, I am not decideding that point; it was the same person, the same engineering firm, involved in both cases, and for that reason I am going to overrule the objection, if the contract in the former case is put in evidence. If it is just how they treated their contract, that is no evidence of the comparison between the two contracts. That contract might have provided for payment of the Gross Income Tax.

I will sustain the objection, unless there is some further basis for it.

Mr. McNally: Well, it does not so provide.

20 I will ask the reporter to mark these documents in order.

The Court: The objection is overruled, for those reasons, and with that reservation.

Mr. McNally: Mark them Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, and 8.

The Court: Better answer the question, too.

Mr. McNally: I will go to that, sir.

Mr. Friedrich: These documents you are identifying, are they all State Line contracts?

Mr. McNally: Yes.

(Said instruments were marked Plaintiff's Exhibits 1 to 8, inclusive.)

By Mr. McNally:

Q. I showed you previous to the discussion that has just taken place before the Court these Chicago District Electric Generating Corporation contract papers with Herlihy Mid-Continent Company, which have now been identified as Plaintiff's Exhibits 1 to 8, and ask you to state if, on the "cost plus" element in such contracts, the Indiana Gross Income Tax was billed and paid.

Mr. Friedrich: We renew the objection.

21 The Court: The record may show that there is a continuing objection, and the same ruling.

By Mr. McNally:

Q. Is that correct?

A. Yes; I assume these are the billings.

Q. Yes.

Mr. Friedrich: Are you going to offer them in evidence?

Mr. McNally: Yes. I now offer in evidence Plaintiff's Exhibits 1 to 8, for the purpose of the Court's request, as stated by the Court.

The Court: Are these the contracts?

Mr. McNally: Yes, and they are the billings. The bills are sent with the costs generally monthly, and they have the actual costs expended, and also the Indiana Gross In-

come Tax that was paid. I don't represent that these are all of the papers in connection with the State Line contract. As Mr. McMeen knows, that was a terrific job. I just pulled some of them. I didn't intend to introduce
22 them. I didn't think there would be any question that on the "cost plus" feature of the State Line job the contractor was paid the Indiana Gross Income Tax.

As your Honor very aptly asked, was there any specific provision, there was not. In fact, as I recall, there wasn't any provision such as even the disputed one in this case, referring to state and local taxes, the use of the word "taxes," maybe not the latter.

The Court: Do you want a little time to look these over?

Mr. Friedrich: I think we would have to have a little time, your Honor.

The Court: Do you want to do it now, or later? I didn't want to take a recess right away, if we could avoid it.

Mr. Friedrich: Well, I would like to do it now. I think we are going to just save time if we could a minute to look at them.

(A short recess was taken.)

Mr. Friedrich: We have examined these contracts and exhibits, and the defendant objects to each of the ex-
23 hibits numbered 1 to 8, both inclusive, for the following reasons:

Exhibit No. 1 is a contract between Chicago District Generating Corporation and Herlihy Mid-Continent. It is a fixed fee or lump sum contract. It contains no language that is similar to the language in the contract or any of the contracts involved in this suit. And for the further reason that this contract was made in 1943, or thereabouts, the 12th day of April, 1943, between different parties. That the defendant is not bound, and cannot be bound by a contract made with an entirely different person in 1943.

For the same reason, the defendant objects to Plaintiff's Exhibit No. 2, which is a contract between Chicago District Generating Company and the plaintiff, dated February 12, 1943. This contract, upon an examination of it, contains no language such as is found in the contracts in suit, upon which the issue in this case is to be determined, so this contract, and the other contract, have no probative force in this case.

Now, the other exhibits are billings made by Herlihy, the plaintiff, under these two contracts. I am referring to Exhibits 3, 4, 5, 6, 7, and 8 I guess are orders by Chicago District Generating Company. They have absolutely no materiality. But in Exhibits 3, 4 and 5, billed by the plaintiff under these two contracts which are offered in evidence, there is a billing of "1% Indiana Gross Income Tax," but from an examination made of the contracts themselves, this billing is not in accordance with the terms of the contract, and regardless of what Herlihy, the plaintiff, and the Chicago District Generating Company had, whatever arrangement, whether it was under the contract, or under arrangements made after the contract, they were signed in 1943, and are not binding, and cannot be binding, and cannot give any aid to the Court in construing the contracts in suit here, because the language, the form of the contract, is entirely different.

For each of the reasons, the defendant objects to the introduction of the exhibits.

Mr. Anderson: I would like to add one further objection, if I may, your Honor. There has been no foundation laid at all to show that the matter was ever discussed between Chicago District, the contractor, or anybody else, that the matter was ever in dispute. So far as anything that appears here, for reasons best known to itself, Chicago District could have voluntarily paid the tax. So far as anything that is shown here, the parties could

have compromised this whole matter. It could have been raised finally, when the final bills were in. There is nothing here, no proper foundation laid for these exhibits at all.

Mr. McNally: I don't contend that these contracts are binding upon the defendant. In the State Line situation, they leave out the fact that Sargent & Lundy were the engineers, and while the contract started in '43, as Mr. McMeen said, the work continued up until the time of the execution of the contracts involved in this case. The proof is to show what Herlihy Mid-Continent intended, and had a
26 right to assume was intended, with the same engineers on both jobs. That is the purpose of it.

The Court: With the reservation stated previously by me, the objections are overruled, and the exhibits are admitted.

(And thereupon PLAINTIFF'S EXHIBITS 1 to 8, both inclusive, were admitted in evidence.)

Mr. McNally: I meant to add, before your Honor made his ruling, that I have told counsel, and repeat the offer, that these are only part of the contractual papers and documents in the State Line job, and all of them will be available to them, if they want to see them. They are extremely voluminous, as Mr. McMeen has indicated previously.

Mr. Friedrich: We wouldn't want to see them. They are five and a half years before ours. And, certainly, a man's intent five and one-half years before is no proof.

Mr. McNally: They were running right up. I thought Mr. McMeen's testimony made it clear that the work was running and orders being given on this State Line job right up to and beyond the time that the contracts involved
27 in this case were entered into.

By Mr. McNally:

Q. So that the record is clear on that, isn't that so, Mr. McMeen, what I have just stated?

A. I believe that is true, yes.

Q. Herlihy Mid-Continent Company completed the work under these contracts that I previously identified, and its bills were approved by Sargent & Lundy; is that correct?

A. They were certified.

Q. Certified by Sargent & Lundy to Northern Indiana Public Service Company, and Northern Indiana Public Service Company did not pay—paid everything, let's get it all in, paid everything except the Indiana Gross Income Tax that was billed; is that correct?

A. I assume that's true.

Q. Well, of course, we would be the people who would be hollering, if that wasn't so. But the job that Herlihy under these contracts was to do was accomplished in accordance with the contracts and the specifications?

A. Yes, sir.

Q. You have no doubt about that?

A. No, sir.

28 Q. At the time that proposals were drawn—now, you call those specifications, and I will change it—at the time that the specifications were drawn, the bids considered, and the contracts drafted by Sargent & Lundy, and executed by Herlihy Mid-Continent Company, and the defendant, Northern Indiana Public Service Company, you were conscious of the fact that Herlihy Mid-Continent Company had overhead expenses unrelated to any expenses at the job site; were you not?

Mr. Friedrich: We will object to that. That is utterly immaterial, as to what they considered overhead.

Mr. McNally: I didn't ask him that. I just asked him if he was conscious of the fact that Herlihy Mid-Continent Company had overhead expenses unrelated to the work at the job site.

Mr. Friedrich: Now, here is the answer to that legally, from our standpoint. Here are some contracts entered

into between Herlihy and Northern Indiana Public Service Company. They are signed, and counsel has proved that the work was done and was paid for, Herlihy was
29 paid for it. Now, all prior negotiations on these contracts were merged in the contracts.

The Court: That goes to your motion to dismiss, which the Court reserved ruling on, doesn't it?

Mr. Friedrich: Yes, but—

The Court: If the parol evidence rule prevents this kind of evidence, that is one thing. If it does not, then the question is, is this proper evidence.

Mr. Friedrich: Well, it would be improper evidence, because the contracts are plain and specific on the subject, not only of taxes, but of overhead and expenses.

The Court: Isn't that the question that was reserved on the motion?

Mr. Friedrich: Well, as I understood it, the question was reserved on the motion to dismiss, the whole motion was reserved. You know, it related to custom and usage, and that part is out. Yes, I would say it was; it was raised in that motion. We raised the point, we still maintain it, that these contracts are plain and unambiguous. Some
30 of these contracts, an examination of them will show, have a provision for overhead, and others, the kind of taxes and things that you pay.

Now counsel is asking this witness, didn't he know that Herlihy had overhead at the time that he submitted the proposal, as I understood it.

Mr. McNally: I asked him if he was conscious of the fact that Herlihy had such overhead as I have described.

The Court: Well, without ruling now specifically on this question that was reserved—without ruling on the basic question which Mr. Friedrich has raised in his objection, I am going to receive this evidence, and that question that he raises as to the ambiguity or lack thereof of the contracts involved in this case is reserved.

You may answer.

Mr. McNally: Will you answer?

A. Yes.

By Mr. McNally:

Q. The answer is yes?

A. Yes.

31 Q. Such overhead as you were conscious of the fact of at that time, Herlihy Mid-Continent Company had general offices in Chicago's loop, had to pay rent, salaries, and so on, for the offices; is that right?

A. Yes.

Q. At the same time, the time I described in my previous question, you and the firm of Sargent & Lundy knew that there was an Indiana Gross Income Tax, didn't you?

A. Yes.

Q. There wasn't any other State of Indiana tax that you knew of at such time that Herlihy Mid-Continent Company might be liable for in performing the contracts on which this suit is brought?

A. That I knew of?

Q. Yes.

A. No.

Q. There were other contracts let for the construction of the extension to this generating station on Lake Michigan at Michigan City for Northern Indiana Public Service, were there not, other contracts than the Herlihy contracts?

A. Yes.

Q. In accordance with the subpoena served upon
32 you, you have produced, I presume, seven of such contracts; is that correct?

A. Yes.

Q. Will you get them?

(The witness produced instruments and handed them to counsel.)

Q. So the record is clear, these are contracts between

Northern Indiana Public Service Company and other contractors on the same job that is involved in this lawsuit; is that correct?

A. Yes, sir.

Q. And of course your firm, Sargent & Lundy, were the engineers and performed the same services as to these contracts as you did in connection with the Herlihy contracts?

A. Yes, sir.

Q. In each of those seven contracts, where the subject of taxes is dealt with, there was a notation made in pen and ink that the Indiana Gross Income Taxes were excepted, isn't that correct?

And I will ask you to refer to the cont. acts.

Mr. Friedrich: We will object, your Honor, to that. The contract, if it is offered, speaks for itself.

33 The Court: I will sustain the objection, on that basis.

Mr. McNally: Well, I don't think it is necessary to put all of these contracts in evidence. Maybe when you see it, Mr. Friedrich, you will see what I mean.

Mr. Friedrich: Put it in. There is a lot about it I want to ask the man preliminarily. Point it out. You don't have to put them all in.

Is the Babcock & Wilcox contract there?

Mr. McNally: No.

Mr. Friedrich: Why didn't you bring that one?

Mr. McNally: Well, you can bring out about that. I have no objection to that.

So that we won't have to put in all of these contracts, Mr. Friedrich, I am going to read, or have him read, into the record what the contract provided with regard to taxes, then the notation in pen that was put on the contract, inserted in the provisions concerning taxes.

34 By Mr. McNally:

Q. Now, before we start, I want to ask you if it isn't a fact that these pen notations were made by Sargent & Lundy?

A. Yes.

Q. Now, the first contract is backed and says, Sargent & Lundy, Engineers, Chicago, Illinois, and it is contract K-856. Under that designation it recites Northern Indiana Public Service Company, Richardson Scale Company, Coal Scales. Then underneath that, Michigan City Generating Station, Units 2 and 3, Michigan City, Indiana, February 14, 1949.

Now, will you from page 847—is that the page?

A. No.

Q. From page C-5, read first what is stated as to taxes, and then, after you do that, read the pen and ink notation that was inserted, and where it was inserted.

Mr. Friedrich: Well, now, wait a minute. You first have to offer it. If you offer it, I have a right to see it.

Mr. McNally: Oh, I want you to see it.

The Court: But you are only offering that portion
35 of it?

Mr. McNally: That's right.

The Court: You are offering that portion of that contract.

Mr. Friedrich: This document here hasn't been identified. We are going to have a lot of documents here. This contract K-856 has nothing to do with construction work. It is for the furnishing of some coal scales shipped to Michigan City, and it talks about f.o.b. cars, Clifton, New Jersey. And certainly that wouldn't aid us, even though "except Indiana Gross Income Tax" is put in there. There wouldn't be any tax due. It is an interstate shipment of material or machines, I presume, from Clifton,

New Jersey, to Michigan City, Indiana. Therefore it is utterly immaterial in determining the issue in this lawsuit.

The Court: Well, these matters, it seems to me, have to be looked into and at in context, looked into rather thoroughly, more thoroughly than I can look into them right now, or even hear you on them right now, and
36 also perhaps in context with the whole problem, so for that reason I am going to overrule the objection.

As to the mechanics of it, I don't know how you want to handle it. If you want to attempt to do it so as not to encumber the record any more than possible, I will at least hear you on your suggestion.

Mr. McNally: Well, I am not positive about this—

The Court: If you want to put in what you want to put in, over objection, without putting the document in itself, and Mr. Friedrich wants to amplify it by other excerpts without prejudice to his objection, I will permit it.

Mr. McNally: Well, these are not my contracts. In view of his objection, I would prefer to put in all of the contracts. I don't think it is necessary. Some of these I am sure, I am not positive about this one, are more than just selling material. It is installing, just like Herlihy installed material.

37 Am I correct on that, Mr. McMeen?

The Witness: Some of them are. That particular one isn't.

Mr. McNally: I am perfectly willing to take what Mr. McMeen says, in order to avoid putting them all in, which ones are simply material and which are installation, like Herlihy installed material. They all have, I know they all have this same clause whereby the Indiana Gross Income Tax was specifically excepted, and, frankly, I am going to show, and as you know, no such exception ap-

pears on Herlihy's contracts. That's the purpose of it, frankly.

Now, if we can agree, and I will with you, I will let Mr. McMeen state, on those two subjects, just what the language was as to tax and whether it was merely a sale of material or sale of material plus installation. He knows and can tell quickly by looking at each one, if you will withdraw your objection, insofar as it pertains to the whole document going in.

38 Mr. Friedrich: I see no reason for putting the whole document in, myself. I think that it would save time to let Mr. McMeen take each one of those contracts and give a resume or analysis, or whatever you call it.

The Court: You may do so, and specifically without prejudice to your main objection.

Mr. Friedrich: Yes.

Mr. McNally: That goes to the materiality, and not to the competency, how it is going in, I take it.

Mr. Friedrich: All right, you do that. We have our men here. The same thing we will do then, with all of these contracts.

Mr. McNally: Well, I will cooperate the same way.

Mr. Friedrich: Well, go ahead.

The Court: Better restate the question, so he will know what to answer.

By Mr. McNally:

Q. Will you read the tax provision in this contract that I previously identified, K-856? And that will

39 refer back to my previous question.

You are reading now from page C-5?

A. Yes. That is an exhibit. Do you want that introduced?

The Court: No, just read it.

By Mr. McNally:

Q. You just read it; we have agreed that you just read it.

A. "Tax. Any sales, use, occupational, excise, and/or other tax levied by either federal, state, or municipal authority applicable to the sale and/or purchase of this equipment is not included in the price herein stated, and when due shall be paid by you without cost or charge to us, and if required to be paid by us shall be added to the purchase price."

Q. Now, will you read that same provision with the pen and ink insertion that appears thereon, indicating, when you get to that insertion, that it is an insertion?

A. "Tax. Any sales, use, occupational, excise, and/or other tax levied by either federal, state, or municipal authority applicable to the sale"—insert, "except Indiana Gross Income Tax," end of insert—"and/or purchase of this equipment is not included in the price herein stated, and when due shall be paid by you without cost or charge to us, and if required to be paid by us shall be added to the purchase price."

The Court: You meaning who, in this particular instance?

The Witness: In this particular instance, this is the supplier, the manufacturer.

The Court: What is his name?

The Witness: Richardson Scale Company.

The Court: And "us" meaning Northern Indiana Public Service?

The Witness: "Us" meaning Richardson Scale Company.

The Court: It couldn't mean both, "you" and "us". "You" means one person, and "us" means the other.

The Witness: I thought you asked about "us".

By Mr. McNally:

Q. He asked about "you," "paid by you"; by "you".

A. By "you" meaning Northern Indiana Public Service Company, and "us," Richardson Scale Company.

41 Q. Now, will you go to the next contract which you have before you, which is identified as contract 853, Northern Indiana Public Service Company with Pennsylvania Crusher Company, for coal breakers, and it is at the Michigan City Generating Station, Units 2 and 3, Michigan City, Indiana, Job 1790.

This whole job was identified, the whole job was Job 1790; is that correct?

A. That's right.

Q. Do you find a similar provision?

Mr. Friedrich: Our objection is renewed.

The Court: The record may show a continuing objection, and the same ruling.

By Mr. McNally:

Q. You are reading now from page—

A. Page 1-A of the exhibit.

Q. Will you read the provision under "Taxes"?

A. "Taxes: Any tax imposed by any present or future law on the sale use of articles covered hereby, and also any tax on the privilege of making such sales, or of doing the business involved in the transaction, shall be added to the amount paid hereunder."

42 Q. Now, will you read that same provision with the pen and ink insertion as to the Indiana Gross Income Tax, indicating where the insertion comes?

A. "Any tax imposed by any present or future law on the sale use of articles covered hereby, and also any tax levied the privilege of making such sales"—insert, "except Indiana Gross Income Tax"—

Q. That is "levied on"?

A. "Levied on," yes; "except Indiana Gross Income Tax"—end of insert, "or of doing the business involved in the transaction, shall be added to the amount to be paid hereunder."

Q. Now, was that contract for material only, or for material and installation work?

A. That is for material only, equipment.

Q. The next contract that you have before you involved in this job 1790 is K-801, erection of a car dumper. It is between Northern Indiana Public Service Company and Wellman Engineering Company.

Now, will you turn to the tax provision in that contract?

Your letter of intent on that contract that I have just identified to Wellman Engineering Company, Cleve-
43 land, Ohio, under letter of Sargent & Lundy, by you, H. H. McMeen, stated as follows, did it not:

"It is to be understood that the Northern Indiana Public Service Company will not pay any invoices covering any State of Indiana Gross Income Tax on this contract."

Is that correct?

A. Yes.

Q. And that letter was sent by Sargent & Lundy to Wellman Engineering Company July 20, 1948; is that correct?

A. Yes.

Q. Now, that contract that we have just been talking about, the erection of a car dumper, was that merely a sale of material, or was that the work of installation?

A. That was installation, too.

Q. The next contract is K-802, between Northern Indiana Public Service Company and Stephens-Adamson Manufacturing Company for Job 1790. Will you turn to the tax provision on that job?

Now, you have turned to page 25, and under the subject,

"Duty and Tax," there is an insert, but in this instance the insert is in typing, rather than pen and ink, as on
44 the others; is that correct?

A. That is correct.

Q. Will you read the provision as to tax? You might as well read it with the insertion, indicating what the insertion is. That will save double reading.

A. "Duty and Tax: Any duty, impost, license, or other tax, or tax or exaction, levied for the privilege of doing business, and any sales, use, or occupation tax so levied, and any tax or imposition of any other kind or character (whether federal, state, or local, in any of the cases above enumerated, except seller's payroll taves)"—insert, "and Indiana Gross Income Tax," end of insert—"insofar as same shall be levied or exacted on account of or resulting from this contract of sale, and any construction and erection and engineering services in connection therewith, and any receipts derived therefrom, shall be paid or refunded by the purchaser."

Q. Now, that contract was for pole handling equipment. Did it include construction work?

A. No.

Q. It was merely a sale of material?

45 A. Equipment, yes, material.

Q. The next contract in front of you is K-811, between Northern Indiana Public Service Company and Ingersoll-Rand Company. Will you turn to the same job 1790, and will you turn to the tax provision of that contract?

You are reading now from page 7?

A. Page 7, yes.

"Taxes: The purchaser shall pay to the Company, in addition to the purchase price, the amount of any excise, sales, privilege, or use tax, local, state, or federal, which are payable by the Company because of the execution of

this contract, or sale, or delivery, of the apparatus covered hereby''—insert, ''not including, however, Indiana Gross Income Tax,'' end of insert.

Q. And end of the—

A. And end of the tax paragraph.

Q. That insert as to the Indiana Gross Income Tax, is in pen and ink; is that correct?

A. Yes. And that's for equipment only.

Q. Equipment only.

All right, the next one is K-809, contract between
46 Northern Indiana Public Service Company and Westinghouse Electric Corporation, for Job 1790.

You are reading from page identified thereon as page 36. Will you read what is there on the subject of taxes?

A. ''Prices do not include state or local taxes based on or measured by sales, which tax or taxes will be added to the price, where applicable''—insert, ''except Indiana Gross Income Tax'', end of the insert.

Q. And end of the provision?

A. End of the provision.

Q. And that insert is in pen and ink?

A. Pen and ink.

The Court: May I see it?

(Said instrument was handed to the Court.)

By Mr. McNally:

Q. Was that a sale of material only, or material and installation?

A. That's material only.

The Court: I would like to ask a question:

What does that mean, as to who pays the Gross In-
47 come Tax on that particular contract?

The Witness: It is supposedly an exclusion of the Indiana Gross Income Tax, and a statement where they include all taxes.

The Court: Well, if any Gross Income Tax was payable under this contract, who paid it?

The Witness: Westinghouse.

By Mr. McNally:

Q. That was the purpose of making these other inserts on these other contracts that you have identified, wasn't it, Mr. McMeen, to make it clear to these people that they were to pay the Gross Income Tax and not be reimbursed for it?

A. Yes, sir.

Q. Now, the last contract that you have before you is K-854, between Northern Indiana Public Service Company and Westinghouse Electric Corporation, for the same job, 1790. Will you turn to the tax provision on that job, on that contract?

Mr. Anderson: What was that last number, Mr. McNally?

Mr. McNally: The last number I gave was the general number of the job, Sargent & Lundy's, 1790.

Mr. Anderson: No, I mean the number of the last contract.

Mr. McNally: K-854.

By Mr. McNally:

Q. You are reading now from page 26 of that contract?

A. "Prices do not include state or local taxes based on or measured by sales, which tax or taxes will be added to the prices, where applicable,"—insert, "except Indiana Gross Income Tax," end of insert. It is in pen and ink.

Q. Now, was that contract a sale only, or sale and installation?

A. Sale only.

Q. Who put in the relay panels?

A. The electrical contractor.

Q. Mr. McMeen, no such exception or notification as to

the Indiana Gross Income Tax was noted on any of the contract papers between Northern Indiana Public Service Company and Herlihy Mid-Continent Company, was it?

Mr. Friedrich: We will object to that. The papers are introduced here in evidence.

49 Mr. McNally: They so show, but I want to make it very clear that on any of the contract papers no such notation was made.

If that is agreed, that's all.

The Court: You mean any of the contract papers other than the contract itself?

Mr. McNally: If that is agreeable.

The Court: I suppose it is susceptible to the best evidence rule.

By Mr. McNally:

Q. All of the papers that were exchanged would go as high as the ceiling, wouldn't they, Mr. McMeen?

A. Yes.

The Court: Objection overruled.

The Witness: Will you repeat the question?

By Mr. McNally:

Q. No such exceptions or notations were made on the contractual papers pertaining to the contracts between Herlihy Mid-Continent Company and Northern Indiana Public Service Company on this job 1790?

Mr. Friedrich: We will object further. The question is too indefinite to call for an answer. The question

50 is, "contractual papers." That might mean papers before the contract was signed, after the contract was signed, and it may or may not mean the contract itself.

Mr. McNally: Well, I will limit it to the contract. Is there any contention that such exception was ever made on any papers?

Mr. Friedrich: I don't know. I know that the con-

tract on which you brought your suit has no such language in it.

Mr. McNally: Well, I think then that he should be permitted to answer it, because it would be a voluminous record, blown up as big as a balloon, if we brought in all of the papers, and they did, with reference to this job.

Mr. Friedrich: The objection goes to the definiteness of the question, not to whether or not the man can testify. I appreciate the rule that where you have a voluminous amount of documents that an expert can examine those documents and testify as to an analysis of them.

The objection isn't to that. It is what you asked, "con-
51 tractual papers." What do you mean by "contractual papers"?

Mr. McNally: Just the kind of papers that he has up there pertaining to the other contracts. I presume they are all the contractual papers.

The Court: Read the question. (Question read.)

The Court: Well, I will overrule. If there was any such exception, I assume that the defendant could produce it.

Mr. McNally: What is your answer?

The Witness: I don't believe I can answer that, for any other papers.

Mr. McNally: As far as you know.

The Witness: As far as I know, there is none.

Mr. McNally: That's all.

52 *Cross-Examination by Mr. Friedrich.*

Q. Counsel, in his direct examination of you, spoke about Sargent & Lundy, your firm, being agents. Sargent & Lundy were not agents of Northern Indiana Public Service Company, were they?

Mr. McNally: I object to the question. It obviously calls for a conclusion, not only a conclusion of fact, but a mixed question of law and fact.

The Court: Did you ask him about his relationship?

Mr. McNally: I asked him specifically just what he was to do. The Court can determine what his capacity is. I don't think that this man should be asked as to whether, in the eyes of the law, he was an agent, or not.

Mr. Friedrich: Counsel used the word "agent".

The Court: Well, he may have done it in addressing the Court, but did he do it in his examination of the witness?

53 Mr. McNally: Definitely not. I have my questions right here. I did not ask him that question.

The Court: I think I will have to sustain the objection.

By Mr. Friedrich:

Q. Then the relationship between Sargent & Lundy and Northern Indiana, the defendant, was governed by the contract, is that right, and the admission that the defendant made?

Mr. McNally: I object to that. It calls for another conclusion.

The Court: Well, I suppose that, factually, their relationship is governed by some kind of fact, either contract or contracts, oral or written, so I assume you would have to lay a foundation as to where you would go to look t find the facts on which the legal conclusion could be based.

I will overrule the objection.

Read the question.

(Question read.)

The Court: What do you mean, "admission that the defendant made"?

54 Mr. Friedrich: We made an admission here as a matter of pleadings; we pleaded the contract. I think that should go out.

By Mr. Friedrich:

Q. Isn't it a fact, Mr. Witness, that the relationship between Sargent & Lundy and Northern Indiana is gov-

erned by the contract that was entered into between the parties for doing architectural and engineering work on the Michigan City job?

A. Yes.

Mr. McNally: I object to that. It calls for a conclusion.

The Court: Well, overruled.

By Mr. Friedrich:

Q. Now, we are getting down to these contracts here that you have been interrogated about, and which you have read. These are office copies, as they state on them, that are kept by Sargent & Lundy; right?

A. Yes.

Q. Are these executed copies of the parties themselves?

A. Yes.

Q. Where are they signed?

(The witness indicated.)

55 Q. This exception under which the Northern Indiana was not to pay the Indiana Gross Income Tax, put in there in pen and ink, who put that in?

A. Sargent & Lundy.

Q. Well, did you put it in?

A. No, I did not put it in.

Q. Do you know when it was put in?

A. No, sir.

Q. Do you know why it was put in?

Mr. McNally: I object to that. It speaks for itself. If he did not put it in, how would he know why it was put in? The purpose is obvious. Here is a man who says that he didn't make the notation himself. It is on the contract. Now, why it was put in by somebody else—

Mr. Friedrich: You qualified this man as the expert to handle all of the documents here.

The Court: If he knows why, if he knows some reason—you can't speculate or know why somebody else did it,

but if you know why it was done, I will overrule the objection; if you know.

56 The Witness: I know.

The Court: All right, you may answer.

By Mr. Friedrich:

Q. Well, why was it done?

A. By instruction.

Q. From whom?

A. Northern Indiana Public Service Company.

Q. And what were the instructions from the Northern Indiana Public Service Company?

A. I think basically just to—

Mr. McNally: I object to that. If he got the instructions, he can answer. He asked, what were the instructions from Northern Indiana.

The Court: What kind of instructions did you get, what were they?

Mr. McNally: You personally.

A. To insert—

Mr. McNally: No. What kind, the Court asked.

The Court: I didn't ask the question. Let's get the question. What did Mr. Friedrich ask?

(The record above from line 4 through line 9 was ? ? ?

57 The Court: All right; you may answer that.

Mr. McNally: Were they in writing, made by somebody else? I think he ought to identify it.

The Court: All right, will you identify it, as to whether it came to you in writing, and from whom, or otherwise and from whom, and when, about.

The Witness: It came verbally during—

Mr. McNally: To you?

The Witness: To me, during the summer of 1948, I believe.

Mr. McNally: I object to any further answer, on the ground that it is a communication from Northern Indiana

Public Service to Sargent & Lundy, particularly Mr. McMeen, outside of the presence of the plaintiff.

The Court: Well, I am going to overrule the objection.

By Mr. Friedrich:

Q. Isn't it a fact, Mr. McMeen, that at that time there were two memorandums made of the excluding of the Indiana Gross Income Tax by your firm, Sargent &

58 Lundy?

Mr. McNally: I object to that. The two memorandums would be the best evidence.

Mr. Friedrich: Well, I am going to get to that.

The Court: He just asked if there were. He isn't asking for the contents, so I will overrule the objection. What is your answer, yes or no, as to whether or not there were two memorandums?

A. I know of one; I am not sure of the two.

By Mr. Friedrich:

Q. Where is that memorandum?

A. I expect it is in our correspondence file.

Q. You had a subpoena duces tecum, didn't you, to produce records here, all of the records of Sargent & Lundy relating to these contracts?

A. Yes, sir.

Q. Did you bring that memorandum along?

A. No, sir.

Q. Did anyone talk to you and tell you to bring it or not to bring it?

A. No, sir.

Q. It is in your office in Chicago?

59 A. Yes, sir.

Q. Was that memorandum up there made by you?

A. One of them was. I am not sure of the second one that you mention.

Mr. McNally: Well, I object to that. As I understood

it, these were memorandums, written memorandums of instructions given by Northern Indiana to Sargent & Lundy.

The Court: I don't know what they are.

Well, there is no question before the Court.

Mr. McNally: He is talking about one thing, and Mr. Friedrich is talking about another.

His question was if there were memorandums of instructions sent to Sargent & Lundy.

The Court: He didn't say "sent".

Mr. Friedrich: Well, of course, it goes to explain all of these things.

The Court: Well, there is nothing before the Court. The question has been answered.

Mr. Friedrich: All right.

By Mr. Friedrich:

(An instrument was marked Defendant's Exhibit 1, for identification.)

60 Q. Mr. Witness, I hand you an instrument identified as Defendant's Exhibit 1. Without stating its contents, I ask you to examine it, and tell us if that is the memorandum or a copy of the memorandum that we have spoken here about.

A. Yes, sir.

Q. This is then a copy of the memorandum that you have spoken about in your office in Chicago?

A. Yes, sir.

Mr. Friedrich: We will offer Defendant's Exhibit 1 in evidence as part of the cross-examination.

Mr. McNally: As you know, it is not proper to offer it on cross-examination, but furthermore, and more basic, it is a communication to Sargent & Lundy from Northern Indiana Public Service Company, and no showing has been made, and I presume none can be made, that this was communicated to Herlihy Mid-Continent Company.

The Court: As I understand it, your reason for this

line of questioning as to these other contracts was to
61 show how these other contracts were treated, treated
differently than your contention that this contract was treated as to the gross income tax. I would assume that that opens up the whole background leading to the result, namely, the insertion of these provisions that you have alluded to. Your company wasn't a party to these contracts, either, so for that reason the same objection could be raised. It would cut both ways, it seems to me. So once it is opened up, the fact that you were not present is not a valid objection.

Mr. McNally: I think your Honor's reasoning is logical on that.

The Court: Objection overruled.

Mr. Friedrich: Shall I read this, or maybe the Court would like to see it.

Mr. McNally: Before you go on, inasmuch as it is before the Court, I would like to point out that the word "manufacturer" is used, specifically.

The Court: The exhibit is admitted.

(And thereupon DEFENDANT'S EXHIBIT 1 was
62 admitted in evidence.)

The Court: I would like to ask a question, for clarification.

Who are Mr. Lindeman and Mr. Hartman?

Mr. Friedrich: They are Northern Indiana men that handled this for the Northern Indiana. They are here in court and will testify later on.

By Mr. Friedrich:

Q. The name "H. H. McMeen," that is you, on the bottom of this memorandum?

A. Yes, sir.

Q. The memorandum says, "Norther Indiana Public Service Company wish to have the signed contract manufacturers advised," and in the first paragraph it says,

"Messrs. Lindeman and Hartman were in June 18, 1948 to discuss approved bidders for materials, construction and Indiana gross income tax as it will apply to erection contracts."

Was it your understanding that in all instances Northern Indiana was not to pay the Indiana Gross Income Tax, and wanted the contracts made with that understanding?

63 Mr. McNally. I object to that. The document speaks for itself. The Court just let it in. To ask him what he understood by the letter, there is no ambiguity in it, I don't think that we should be bound, especially as the witness has been called under Rule 43(b), or suffer from any—

The Court: Well, if there was a discussion between Northern Indiana and Mr. McMeen, that is one thing, but now to go into interpretations of these documents, it seems to me that we would have another question that is about the same as the one that is being raised on the main issue.

I think I will sustain the objection.

By Mr. Friedrich:

Q. Then you prepared this memorandum, this is in your own language, isn't it?

A. Yes, sir.

Q. Your name appears to it?

A. Yes, sir.

Q. And this was prepared after you had a talk with Hartman and Lindeman, of the Northern Indiana

64 Public Service Company?

A. Yes, sir.

Q. Now, Mr. McMeen, regarding this Indiana Gross Income Tax under the Herlihy contracts and all of the contracts, did Sargent & Lundy have anything to do with that, or was that billed and handled directly with Northern Indiana Public Service?

Mr. McNally: Will you read the question, please?

(Question read.)

Mr. McNally: Well, it was on the billings.

Mr. Friedrich: Well, I am meaning now, did Sargent & Lundy have anything to do, as far as the Indiana Gross Income Tax was concerned.

Mr. McNally: I object. What do you mean, have anything to do with it?

Mr. Friedrich: Whether they approved it, whether they had the right to approve it, or the right to disapprove it.

Mr. McNally: I don't contend that they did, in the sense that I take it you mean. They were dealing for them.

Mr. Friedrich: That's what I want to prove, that they were not.

The Court: Well, I think the question is not sufficiently specific. If you could rephrase it so that it is not vague as to what you mean by "dealing with," or "having something to do with," I think it would be helpful in finding out exactly what is asked.

Mr. Friedrich: I will withdraw the previous question.

By Mr. Friedrich:

Q. In any of the billings under the Herlihy contracts or any of the other contracts that you have identified and have present here in court, did Sargent & Lundy pass or approve any billing for Indiana Gross Income Tax?

A. No, sir.

Mr. McNally: Do you mean a bill that had the Indiana Gross Income Tax—

The Court: I think you better wait, to straighten it out.

Mr. McNally: All right.

By Mr. Friedrich:

Q. If there was a billing for the Indiana Gross Income Tax, isn't it a fact, Mr. McMeen, that that was turned

66 directly over to the Northern Indiana itself for approval or disapproval?

A. Yes, sir.

Q. Sargent & Lundy then had nothing to do with the payment or nonpayment or whether the Indiana Gross Income Tax was included in the contract, or not?

Mr. McNally: I object to that. That's a conclusion that the Court can draw, what it had to do with it, with reference to its relationship to Herlihy.

The Court: You mean as to payment, or billing?

Mr. Friedrich: I mean as to approval or disapproval.

By Mr. Friedrich:

Q. Any bills that were sent to Sargent & Lundy that contained a statement of the Indiana Gross Income Tax, Sargent & Lundy did not pass on that question, did they?

A. No, sir.

Q. They did pass on the amount of labor, materials, and things of that kind; is that right?

A. Yes, sir.

67 The Court: When you say "pass on it", would the contractor send the bill to you, and then you approve it and send it on to the Northern Indiana Public Service, is that the way it was done?

The Witness: No; the bills were sent to Northern Indiana Public Service, and they in turn sent them to us for certification for the amount of work that was done, or whether or not it was in accordance with the contract, and we would certify those invoices and return them to Northern Indiana Public Service Company for payment.

The Court: Gross income tax bills that were received by Northern Indiana from people that sent bills having to do with gross income tax, did they come to you?

The Witness: They would come through me, and I think in general those would be called to the Northern Indiana Public Service Company's attention, or we would request that a revised invoice be submitted.

The Court: What do you mean by that?

68 The Witness: Through Northern Indiana Public Service Company. In other words, the invoice was not complete, insofar as the contract was concerned, for a complete certification.

The Court: Well, go ahead.

By Mr. Friedrich:

Q. Well, now, what I want to get at, or find out about, this certification that you just spoke about, that Sargent & Lundy did on these invoices, as you called them, that certification had nothing to do with the Indiana Gross Income Tax, did it?

A. Nothing.

Q. It had to do only with the amount of labor or materials, or condition of equipment, and so on, matters of that kind?

A. I believe that's right.

Mr. Friedrich: If you have further questions, go ahead.

Mr. McNally: Have you finished?

Mr. Friedrich: Yes.

69 *Redirect Examination by Mr. McNally.*

Q. Mr. McMeen, the bills that were sent by Herlihy Mid-Continent Company, as I understand your testimony under the questioning of his Honor, the bills orginally would go to Northern Indiana Public Service Company, and then by it sent to Sargent & Lundy; is that the fact?

A. That's correct.

Q. On those bills, you never struck out any billing for Indiana Gross Income Tax that was included, did you?

A. I am not sure of that; I thought we had, but I am not sure.

Q. These bills were for Herlihy's actual costs, plus the fixed fee, is that correct, and you would check them for that purpose?

A. Yes; I believe they were for 85 per cent of the costs.

Q. Well, that 15 per cent would be a reserve payment, to be paid when the job was finished?

A. Right.

Q. And you would check these bills to see that they were accurate as to costs expended by Herlihy?

70 A. And time.

Q. And that the computation of time of work and so on was correct?

A. Yes.

Q. Mr. Friedrich asked you about this letter of instruction that he produced and offered in evidence as Defendant's Exhibit 1.

Did I ever see you before last Friday afternoon?

A. No, sir.

Q. You were served by a marshal with a subpoena duces tecum Friday morning; is that correct?

A. Yes, sir.

Q. And you had your lawyer call me, and I went over to your office and said that, to avoid having you carry out a number or documents, I would come to your office and discuss it in the presence of your lawyer; is that correct?

A. Yes, sir.

Q. And I met one of your partners and another gentleman. You told us that the correspondence was extremely voluminous; is that correct?

A. Yes, sir.

Q. Did I ever tell you not to bring out this De-
71 fendant's Exhibit 1?

A. No, sir.

Q. Was there any discussion about it?

A. No, sir.

Q. In other words, what you did not bring out in accordance with the subpoena duces tecum was through

my cooperation with you so that you would not have to bring anything unnecessary?

A. Yes, sir.

Q. And there was nothing that I said or did in connection with this subpoena to exclude that letter, or any other document, was there?

A. No, sir.

Mr. McNally: That is all.

Recross Examination by Mr. Friedrich.

Q. The contracts that were up there that you examined, your office copies, how many of them—I don't know whether you testified—how many of them were just for equipment, out of these here?

Mr. McNally: I asked as to each one. My recollection is all but two.

Mr. Anderson: All but one.

72 The Court: Well, do you want to go through them hurriedly?

Mr. Friedrich: Can you do that hurriedly?

The Witness: I think there are two here for erection.

By Mr. Friedrich:

Q. Two for erection, and the others are just for equipment?

A. That's correct.

Mr. Anderson: I wish you would check that.

The Court: Are you going to be here this afternoon, Mr. McMeen?

Mr. McNally: I have finished with him.

You can do it before you leave, and Mr. Friedrich and I will agree what the fact is. You did say two, I think.

The Witness: I think that's right.

The Court: Other than this correction, are you through with Mr. McMeen?

Mr. Friedrich: There is one thing more I think we can prove by this man.

The Court: This is not on cross?

73 Mr. Friedrich: Yes, it is further on cross—it is not properly cross.

Will you mark this Defendant's Exhibit 2?

(Said instrument was marked Defendant's Exhibit 2, for identification.)

Mr. Friedrich: These are the contracts between Northern Indiana and Sargent & Lundy. We file copies with the auditor, you know, and while I had the man here, I was going to—

Mr. McNally: He can check those and tell me that they are, all of them, and that's enough; I will agree to that, as well as on the other thing.

By Mr. Friedrich:

Q. Will you look at these, then. These are the contracts between Sargent & Lundy and Northern Indiana when your firm was hired to do the work.

A. Yes.

Q. Will you check those, and then tell us whether they are, or not?

A. Here?

The Court: Before you leave.

Mr. McNally: Before you leave, and then I will

74 agree.

Mr. Friedrich: That is all, Mr. Witness.

The Witness: There is one of those contracts that is for erection.

The Court: Only one?

The Witness: Yes.

By Mr. Friedrich:

Q. Mr. McMeen, that one contract for erection, who was that with?

A. That was with Wellman, for the erection of a car dumper.

Q. Wellman?

A. Wellman Engineering Company. That is No. K-801.

Mr. Friedrich: That is all.

(And thereupon the witness was excused.)

The Court: I have a matter at one, which will take probably fifteen or twenty minutes, maybe a little longer. Is one thirty all right?

Mr. McNally: One thirty is fine, sir.

(And thereupon a recess was taken until one thirty o'clock in the afternoon.)

75 And at one thirty o'clock in the afternoon of said day, Monday, February 26, 1956, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

(Instruments were marked Defendant's Exhibits 3 and 4, for identification.)

Mr. Friedrich: As part of Mr. McMeen's testimony, counsel and I have discussed it, and the parties now stipulate that the relationship between Sargent & Lundy and the defendant is governed by three contracts, which have been identified as Defendant's Exhibits 2, 3, and 4, and that these contracts are the same as were filed in the answer of admission that the defendant made to a request by the plaintiff.

Mr. McNally: I agree and stipulate that these are the copies, but I don't agree with the fore part of Mr. Friedrich's statement, that they govern the relationship.

Mr. Friedrich: Well, all right.

The Court: Are you offering them?

76 Mr. Friedrich: We offer them in evidence as part of the cross-examination. Then they will be in for whatever they are worth.

Mr. McNally: I haven't any objection, with that qualification.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS 2, 3, and 4 were admitted in evidence.)

Mr. McNally: Frankly, I don't think it makes any difference whether they were an independent contractor or an agent.

Your Honor, in the exhibits that I had identified this morning and which were received in evidence after your Honor's ruling and discussion, in Plaintiff's Exhibit 2 were included under the cover these three documents, which were separate and distinct, however, as to sheets, so in order to make what has gone in under Plaintiff's Exhibit 2 sensible, to my view of the case, I wish now to have these documents marked Plaintiff's Exhibits 9, 10, and 11.

(Said instruments were marked Plaintiff's Exhibits 9, 10, and 11, for identification.)

77. Mr. McNally: On the same basis as Exhibits 1 to 8, I now offer Plaintiff's Exhibits 9 to 11, both inclusive.

Mr. Friedrich: We object, for the same reasons.

The Court: The objection will carry over to these exhibits.

Objection overruled, and they are now admitted.

(And thereupon PLAINTIFF'S EXHIBITS 9, 10, and 11 were admitted in evidence.)

Mr. McNally: Mr. Smith.

HOMER G. SMITH, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. McNally.

Q. Will you state your name, please?

A. Homer G. Smith.

Q. Where do you live?

A. 2241 West 113th Street, Chicago.

Q. What is your business?

A. I am vice-president of A. Elsinga & Company; also vice-president of Elsinga Cartage Company.

Q. Were you formerly employed by Herlihy Mid-78 Continent Company?

A. Yes, sir.

Q. The plaintiff in this case?

A. Yes, sir.

Q. The companies with which you are now affiliated in the capacities which you have described have no affiliation or connection with Herlihy Mid-Continent Company, have they?

A. None.

Q. When did you go to work for Herlihy Mid-Continent Company?

A. June 26, 1940.

Q. And you continued in such employment until when?

A. January 27, 1956.

Q. During that approximate fifteen year period of time, what position did you hold in Herlihy-Mid Continent Company?

A. I was auditor and in charge of all of the accounting detail.

Q. Are you a certified public accountant?

A. I am.

Q. How long have you been a certified public accountant?

79 A. Since 1934.

Q. You are familiar with the contracts that are involved in this suit, are you not?

A. Yes, sir.

Q. Those contracts, for identification, are K-814, K-825, extra order to K-825, and extra order to contract identified as K-851.

Have you got that in mind?

A. That's right.

Q. The other contract that is attached to the complaint is eliminated, so I want you in your answers to eliminate it, also.

Did Herlihy Mid-Continent Company pay the Indiana Gross Income Tax—

A. Yes, sir.

Q. Wait until I finish; wait on each question.

—on the moneys it received, all of the moneys it received under the contracts I have identified to you in a previous question?

A. Yes, sir.

Q. From the year 1948 to the end of the year 1951 how many employees, total employees, did Herlihy Mid-Continent Company employ?

A. It varies according to the amount of work they
80 have, ranging from about 800 to 1200.

Q. Were those the approximate figures during the years I have mentioned?

A. That is right.

Q. How many general office employees did it have during those years, approximately?

A. This is in the main office only; it would range from 20 to 25.

Q. In your capacity as auditor in charge of the books

and records of Herlihy Mid-Continent Company, did you either make the entries, or all other entries that you didn't make were made under your supervision and control?

A. That is right.

Q. Are the books, records, and accounts of Herlihy Mid-Continent Company voluminous?

A. They are very voluminous.

Q. Would it be fair to say that for the years I have described there would be thousands upon thousands of entries?

A. There are thousands and thousands of entries.

Q. Were the books and records, books of account—I mean all ledgers, all books and records, were they kept in the usual and regular course of business of Herlihy
81 Mid-Continent Company?

A. Yes.

Q. Was it the regular course of business of Herlihy Mid-Continent to keep such books, records, and accounts?

A. Yes.

Q. Have you produced any of the books, records, and accounts of Herlihy Mid-Continent Company in court today that you obtained from their offices yesterday?

A. We have some here, yes.

Q. What are those records?

A. We have the journal ledgers and some journals.

Q. Do those records show and contain the entries pertaining to Herlihy Mid-Continent Company's overhead?

A. They do.

Q. Including the years 1948 to 1951?

A. Yes, sir.

Q. Was Herlihy Mid-Continent Company on a fiscal year basis?

A. They are on a fiscal year basis ending March 31st.

Q. And were during the years I mentioned?

82 A During those years.

Q. Have you computed, from such books and records, the general office overhead of Herlihy Mid-Continent Company for the fiscal years ending 1948, 1949, 1950, and 1951?

A. I have.

Q. What did you include in that general office overhead?

Mr. Friedrich: To which we object, your Honor. It is utterly immaterial, and doesn't prove or disprove any issue in this case. As to what overhead, or whatever items were taken into consideration in overhead by Herlihy, it could not bind the defendant in this case. It has no probative value on either proving or disproving their contention under these contracts.

Mr. McNally: It has this purpose, if the Court please. The overhead of Herlihy Mid-Continent Company during the pertinent years is certainly a matter, under McMeen's testimony, that the defendant knew or should have known.

I say that it knew it, because of McMeen's testimony.

Sargent & Lundy, whether agent or independent contractor, were apprised of Herlihy's operations, and when they tendered contracts in the form that they are, with the disputed clause, all of this evidence will tend to show that certainly Herlihy Mid-Continent Company intended that it was going to receive, as part of its costs, the Indiana Gross Income Tax for which it was liable under the law of this state, and, with McMeen's testimony, it shows that at least Sargent & Lundy knew, or should have known, what that overhead might have been, and whether Herlihy Mid-Continent Company (this will be under the law that I will cite later) had reason to suppose and believe that it was intended that in its costs, as is stated, it was to get the tax in question.

Now we wish to show just what that overhead was for the fiscal year ending before the contract was entered into, March 31, 1948, and how it ran through the pertinent years.

The Court: Well, I am inclined to overrule the objection. However, my ruling is no indication that I am in agreement with your theory of what it tends to prove,
84 or the purpose thereof.

The objection is overruled.

Mr. Friedrich: I just want to make this additional observation, your Honor. In these contracts that Mr. Smith has identified, which are the ones in this suit, there is a separate provision about overhead, in all of these contracts, and a separate price for them, and that is an additional reason why we think—

Mr. McNally: Then beyond that, in this cost is the disputed cost.

The Court: Well, I am going to overrule the objection, with that observation.

Read the question.

(Question read.)

A. Such items as general office salaries, our yard salaries, yard expense (now, that yard is where we store our equipment), interest, general office supplies, general office rent and light, legal and accounting, general insurance (that, incidentally, does not cover compensation insurance on employees on the job; this is general insurance), real estate, personal property, and Social Security tax (and
85 that Social Security tax is only on the office and yard payroll), automobile expense, telephone, dues and subscriptions, postage, traveling and entertainment, and of course there are some miscellaneous.

Q. Are those, in your opinion as a certified public accountant, all proper items to include in general office overhead expense?

A. Yes.

Mr. Friedrich: We wish to renew our objection.

The Court: The record may show a continuing objection.

Same ruling.

By Mr. McNally:

Q. So that "miscellaneous" may be cleared up, there is not included in the general office overhead about which you are testifying as to figures any depreciation on equipment is there?

Mr. Friedrich: We will object to that. It is a leading question. It calls for a conclusion. At least, it is leading and suggestive.

Mr. McNally: I don't know how to put it.

The Court: I think I will overrule it.

86 A. Depreciation is not included in these items.

By Mr. McNally:

Q. Did you include any on the job or job site expenses of any kind?

A. No.

Q. The real estate tax that you mentioned, is that real estate tax on the yard?

A. We have a yard—two yards, we have.

Q. Now, what was Herlihy Mid-Continent Company's overhead for the fiscal year ending March 31, 1948?

Mr. Friedrich: To which we object.

The Court: Overruled.

A. $250,649.12.

Q. What was it for the fiscal year ending March 31, 1949?

A. $359,081.19.

Q. What was it for the fiscal year ending March 31, 1950?

A. $411,875.49.

Q. What was it for the fiscal year ending March 31, 1951?

A. $406,868.43.

Q. Have you from such books of accounts, records,
87 and ledgers of Herlihy Mid-Continent Company computed its gross income for the same fiscal years?

A. Yes.

Mr. Friedrich: We renew the objection to that.

The Court: Overruled, with the same observation.

By Mr. McNally:

Q. Define what you have included in gross income, is it cash receipts and accounts receivable?

A. It is cash receipts and accounts receivable, in other words, it is the gross billing.

Q. Gross billing for the particular year?

A. That is correct.

Q. If only cash receipts were included, it would be smaller than the figures you are about to give; is that correct?

A. Not necessarily. They should be substantially equal.

Q. Well, what was the gross income of the plaintiff for the fiscal year ending March 31, 1948?

Mr. Friedrich: We renew our objection.

The Court: Same ruling.

88 A. $6,243,217.63.

By Mr. McNally:

Q. What was it for the fiscal year ending March 31, 1949?

A. $7,573,410.34.

Q. What was it for the fiscal year ending March 31, 1950?

A. $10,239,423.56.

Q. What was it for the fiscal year ending March 31, 1951?

A. $9,261,201.31.

Q. Have you computed the percentage of gross income for each of such fiscal years that was required for Herlihy Mid-Continent Company's general office overhead expense that you previously testified to?

A. I have.

Q. What was such percentage for the fiscal year ending March 31, 1948?

Mr. Friedrich: We renew the objection, as being immaterial.

The Court: Same ruling.

A. 4.01 per cent.

89 By Mr. McNally:

Q. What was it for the fiscal year ending March 31, 1949?

A. 4.74 per cent.

Q. What was it for the fiscal year ending March 31, 1950?

A. 4.02 per cent.

Q. Did you, Mr. Smith, make computations on cash receipts as distinguished from gross billings?

A. I made the computation, yes.

Q. And on cash receipts—although I want to state now for the record that in my opinion the proper item to take is gross income, but to avoid any objection in that regard I want to put the actual cash receipts for each year—will you give what the actual cash receipts were for the same years, beginning with the cash receipts for the fiscal year ending March 31, 1948?

Mr. Friedrich: We make the same objection to these figures.

The Court: Overruled.

A. $5,863,848.33.

By Mr. McNally:

Q. And for the fiscal year ending March 31, 1949?

90 A. $7,343,439.83.

Q. For the fiscal year ending March 31, 1950?

A. $9,671,201.44.

Q. For the fiscal year ending March 31, 1951?

A. $9,235,942.30.

Q. Have you computed the percentage of such total cash receipts for each such fiscal year that was required for the general office overhead expenses of Herlihy Mid-Continent Company, as you previously testified to them?

A. Yes, sir.

Q. What is the percentage on the cash receipts basis for the fiscal year ending March 31, 1948?

Mr. Friedrich: We make the same objection.

The Court: Same ruling.

A. 4.27 per cent.

By Mr. McNally:

Q. And for the fiscal year ending March 31, 1949?

A. 4.89 per cent.

Q. For the fiscal year ending March 31, 1950?

A. 4.26 per cent.

Q. For the fiscal year ending March 31, 1951?

A. 4.41 per cent.

91 The Court: On the other percentages, the relation of overhead to gross income, you asked as to 1948, 1949, and 1950, but I don't believe you asked about 1951.

Mr. McNally: Thank you, your Honor.

By Mr. McNally:

Q. What was the percentage for the year 1951?

A. The overhead as to gross income was 4.39 per cent.

Q. Did you give it for 1951 on the basis of cash receipts?

A. I did.

Q. Have you computed the total receipts of money that Herlihy Mid-Continent Company received from Northern Indiana Public Service Company on Job K-814?

A. I have.

Q. What was the total on that job, contract?

A. $344,603.19.

Q. What was the total moneys received by Herlihy

Mid-Continent Company from Northern Indiana Public Service Company on contract identified as Contract K-825?

A. $2,227,233.03.

92 Q. What was the total moneys received by Herlihy Mid-Continent Company from the defendant—I will eliminate Northern Indiana—on contract Extra Order 1 to Contract K-825?

A. $118,600.96.

Q. What was the total moneys received by Herlihy Mid-Continent Company on the extra order to contract identified as Contract 851?

A. $53,296.54.

Q. Now, I am going to ask you about this contract that I eliminated, but I want to state for the record that I did eliminate it, but on this phase of his testimony I think the Court may reasonably be interested in it.

You understood that we dropped from this suit the contract attached to the complaint as Exhibit "D," do you recall that, Mr. Smith?

A. Yes, I do.

Q. And that has identification of PO-5695.

Now, what was the total amount of moneys that the Herlihy Mid-Continent Company received from the defendant on that contract?

A. $21,034.77.

Q. What was the total of all moneys received under
93 the contracts which you have identified?

A. $2,764,848.49.

Q. You have looked at these contracts, and you are familiar with the provisions with regard to fees; correct?

A. Yes.

Q. I don't mean amounts, that you remember exact amounts.

And in these contracts, also, at least in two or three of

them, there were provisions for rental of equipment; do you recall that, Mr. Smith?

A. Yes, sir.

Q. I want you now to give me the fees that Herlihy Mid-Continent received on the contracts, and I will call them off to you or state them to you individually, excluding the rental charge for equipment.

On Contract K-814, what was the total amount of fees that Herlihy Mid-Continent Company received?

A. $12,311.66, excluding equipment rental.

Q. Well, so there won't be any doubt about that, the equipment rental is fixed in these contracts, isn't it, at an agreed price between the plaintiff and defendant?

94 A. Yes, there was a stated price.

Q. On 814 and 825?

A. That is correct.

Q. And, further, what does that rental for equipment include?

A. The equipment rental on this contract was to also include small tools and supplies, and transportation of equipment, and the repairs and upkeep of the equipment.

Q. What about tools and equipment expended on the job, that is, used up on the job?

A. Well, on a job of this type there is a tremendous amount of tools and equipment. There are tools and supplies used.

Q. Used up?

A. Yes; consumed on the job.

Q. You gave the figure on 814, excluding the rental. Give me the total amount of fees received by Herlihy Mid-Continent Company on Contract K-825.

A. $78,395.89.

Q. Is that figure excluding the equipment rental?

A. It is.

Q. On the Extra Order No. 1 to Contract K-825, what was the total amount of the fees paid to Herlihy Mid-
95 Continent Company by the defendant?

A. $7,648.43.

Q. On Extra Order to contract identified as 851, the total amount of moneys in fees, total amount of fees paid to the plaintiff by the defendant.

A. $14,565.43.

Q. On the contract now excluded from the case, this PO-5695, what was the total amount excluding—I take it all of these are excluding equipment rental?

A. That is correct.

Q. What was the total amount on PO-5695?

A. $820.77.

Q. You stated that the total receipts of all money by Herlihy Mid-Continent Company from the defendant on the contracts was $2,764,848.49. Have you applied the overhead as stated by you to such total receipts?

Mr. Friedrich: I will object, renew the objection to that.

The Court: Overruled.

A. I have, using just 4 per cent, dropping off the hundredths that were computed.

By Mr. McNally:

96 Q. All right, that is good enough. Go ahead.

A. $110,593.94.

Mr. Friedrich: We move to strike out the answer, for the reasons stated in the objection to the question.

The Court: Denied.

By Mr. McNally:

Q. Will you give now the total of the fees paid the plaintiff by the defendant under the contracts? I forgot to ask you that total.

A. $113,742.18.

Q. What is the fact as to the billings made by Herlihy Mid-Continent Company on this job, were they for actual cost to Herlihy Mid-Continent Company, plus this fee, plus the equipment rental?

Mr. Friedrich: We will object to that. The invoices are the best evidence.

The Court: You say made to Herlihy?

Mr. McNally: No, made by Herlihy.

The Court: I thought you said "made to".

Mr. McNally: I will rephrase it.

The Court: Let's see what you said.

(Question read.)

Mr. McNally: I will strike that. I recall that Mr.
97 McMeen answered what they were.

By Mr. McNally:

Q. Have you computed, from the computations you have given, Herlihy's profit or loss on these contracts?

A. I have.

Mr. Friedrich: We will object to that, as being utterly immaterial.

The Court: I don't see how that is material.

Mr. McNally: Well, I thought to this extent, your Honor, that it again goes to prove that Herlihy Mid-Continent Company could never have intended that it was, under this contract, to pay the Indiana Gross Income Tax, and it means testimony and what I will argue from it that Sargent & Lundy knew, or should have known, that it was impossible for Herlihy Mid-Continent Company to undertake this job and still expect to pay the Indiana Gross Income Tax.

If the provisions of the contract say as part of its
98 costs for which Herlihy Mid-Continent would be paid shall be included all federal, state, and local taxes applicable to the work, I would of course agree that it

wouldn't have any relevancy, but with that in there and the uncertainty raised about what that wording means in the light of the contract as a whole, and the circumstances surrounding it, I think that how Herlihy Mid-Continent Company made out on this job throws a light on what the intentions of the parties must have been.

Mr. Friedrich: I think further that it is speculative. It involves everything beyond the control of the defendant, and whether they made money or lost money, as they know, under construction business, the proof of that would not prove anything under any issue in this case.

The Court: Well, I have some very grave doubts about its probative value, but if it has any, if it may be argued, I don't see any harm in getting the facts. Whether it has any bearing on it is another question.

I will overrule the objection.

99 Read the question.

(Question and answer were read.)

The Court: All right, the next question.

By Mr. McNally:

Q. What was the profit or the loss?

Mr. Friedrich: We renew the objection.

The Court: Same ruling.

A. The profit, based on this computation, is $3,148.24, before giving consideration to the Indiana Gross Income Tax.

Mr. Friedrich: We now move to strike out the answer, for the reasons stated in the objection to the question.

The Court: Motion denied.

By Mr. McNally:

Q. When you say "before giving consideration to the Indiana Gross Income Tax," do you mean that if Herlihy Mid-Continent Company was not repaid the Indiana Gross Income Tax it would lose thirty thousand some odd dollars?

Mr. Friedrich: We object to that. The question is argumentative and calls for the conclusion of the witness.

By Mr. McNally:

100 Q. You clear it up, Mr. Smith. When you say "without consideration of the Indiana Gross Income Tax," I want the record clear on what you mean by that.

A. These computations here and these expenses charged did not include the Indiana Gross Income Tax. Therefore when we paid the Indiana Gross Income Tax of approximately $33,000 that would reduce our profit to a loss of approximately $29,800.

The Court: You mean that on all these four contracts, or five, your total profit, that is, if you hadn't had to pay Indiana Gross Income Tax, would have been $3,148?

The Witness: That is after applying overhead, general office overhead.

The Court: On a contract from which you received from the defendant over $2,700,000?

The Witness: That is correct.

The Court: Go ahead.

By Mr. McNally:

Q. I may have misunderstood his Honor's question. With the Indiana Gross Income Tax paid, you would have a loss of $29,000; you wouldn't have any profit;

101 you have excluded that?

A. Yes; the item I gave of $3,148.24 does not take into consideration the Indiana Gross Income Tax.

Q. While the equipment rental was at an agreed charge in the contracts as they were performed by the parties, I want you to state for the record what total rentals were paid for the equipment.

Mr. Friedrich: We will object, your Honor.

The Court: Well, I have gone into it this far. It seems to me I might as well hear all of these computations.

Mr. Friedrich: All right. May the record show my objection to the question?

The Court: Yes.

By Mr. McNally:

Q. State what the equipment rental was that was received by the plaintiff from the defendant on contract K-814, total rental.

A. I don't have those individually. I know what the figure is in total, approximately.

Q. Well, Mr. Nash just told me you computed it on the basis of including the rental and the fixed fee 102 paid. Did you do that?

A. I did, yes.

Q. As distinguished from the fixed fee paid, excluding rental for the equipment.

The Court: You mean you want the total?

By Mr. McNally:

Q. I want the total now of both, inasmuch as you computed it that way, on Contract 814. The figure I am asking for, Mr. Smith, is the total fees paid to the plaintiff by the defendant and the total rental of equipment on Contract 814, K-814.

A. $19,311.66.

Q. On Contract 825?

A. $135,895.89.

Q. On Extra Order identified as No. 1, that was the only one, to K-825.

A. $21,627.19.

Q. On the Extra Order to the contract identified as 851.

A. $18,546.75.

Q. On the contract out of the case identified as PO-5695.

A. $6,831.85.

Q. Didf Frank J. Herlihy, the president of this
103 company, die recently?

A. Yes, September 20th.

Q. Of what year?

A. 1955.

Q. Did he personally handle the negotiations and dealings in reference to these contracts?

A. Yes.

Mr. McNally: That is all.

Cross-Examination by Mr. Friedrich.

Q. Mr. Smith, did you have someone up there, a clerk or someone in your employ, with the initials J. K. C.?

A. We did.

Q. Give me the full name.

A. John K. Cooper.

Q. What did Mr. Cooper do?

A. Mr. Cooper was in charge of our field office.

Q. Well, what do you mean by the "field" office?

A. He was the field clerk right on the job who saw to the keeping of the time, receiving of the materials, the checking of the invoices, and things like that.

104 Q. Did he do that on the Michigan City job for Northern Indiana, what we are talking about here?

A. He was on that job.

Q. And did he do the work on that job that you have just told about in your testimony?

A. No.

Mr. McNally: I don't understand that question.

By Mr. Friedrich:

Q. Well, he had charge, he was the field clerk, as you say; is that right?

A. That is correct.

Q. Now, as field clerk, tell us exactly what Mr. Cooper's duties were.

A. He checked the time, made up the payrolls, received the materials on the job, checked the invoices, but he kept no records for the general accounting department.

Q. Did you keep the records for the general accounting department?

A. I did.

Q. The invoices that were prepared by Herlihy and forwarded out to the defendant company for payment, did you or your people prepare those?

105 A. They were typed right in Herlihy's main office.

Q. Well, in your department?

A. In my department.

Q. And you saw them before they left, did you?

A. I did, yes.

Q. And did you examine all of them, now, that were billed on these contracts involved in this lawsuit? I am speaking of these invoices.

A. I don't just understand what you mean by "examine" them.

Q. Well, did you look at them before you mailed them out to Northern Indiana?

The Court: You mean Mr. Smith personally?

Mr. Friedrich: Yes.

A. I did.

By Mr. Friedrich:

Q. You did?

A. Yes.

Q. And were they correct, as far as you knew?

A. As far as I knew, yes.

Q. Where did you get the figures that were on these bills, from Mr. Cooper's record, or from these books that you have mentioned here?

A. Mr. Cooper kept the invoices and listed them, and listed the payrolls, and those were sent in to the main office. He listed them just on a penciled piece of paper.

Q. So the figures on these invoices that came out to Northern Indiana were prepared by you, or in your department, and you examined them, and they were taken from Mr. Cooper's records and other records and then made out and sent out; is that it?

A. That is correct, yes.

Q. How many invoices were sent, do you think?

A. How many?

Q. Yes.

A. Oh, they were voluminous.

Q. How many were sent on Contract K-814?

A. Wait a minute; when you say "invoices", do you mean Herlihy's invoices, or invoices—

Q. Herlihy's invoices that were sent out to Northern Indiana to get money. How many did you send on Contract K-814?

A. I don't have that in front of me. I know approximately how long the job lasted, and we billed it almost every month.

Q. And you are satisfied that when you sent those invoices through they were correct; is that a fair statement?

A. Yes.

Q. And Mr. Herlihy, that is the gentleman who is deceased, was the president of the company, and died I think you said in 1955?

A. That is right.

Q. And he was in personal charge of these contracts, that would be in the years 1948, 1949, 1950, and 1951, as you have described; is that correct?

A. That is correct.

Q. And I presume that his office was in your main office that you have described?

A. Yes, sir.

Q. Now, on this job, these figures, who prepared the bidding proposal on these jobs, Mr. Herlihy?

A. Mr. Herlihy.

Q. Did you have anything to do with that?

A. No.

Q. So that you don't know whether the Indiana Gross Income Tax was buried in other figures in this proposal, do you?

Mr. McNally: What do you mean, "buried"?

Mr. Friedrich: He is a construction man; he knows what I mean.

By Mr. Friedrich:

Q. Do you know that, or don't you?

108 A. I had nothing to do with the proposal.

Q. Mr. Herlihy prepared the figures and made the bids; you had nothing to do with that; is that correct?

Mr. McNally: If I may interrupt, if your Honor please, there is a rule of law which prevails in Illinois, I don't know whether it prevails in Indiana, that on a charge of that kind, even on cross-examination, that what we are suing for is buried in some other figures, I have a right to call on Mr. Friedrich and ask him if he is going to prove that. This was cost plus billing, and Sargent & Lundy were checking these bills. Now, so that this case won't get off on a tangent that does not exist, there is no burial. I think Mr. Friedrich ought to state now whether he intends to try to prove that there was one, of the Indiana Gross Income Tax.

Mr. Friedrich: These are not "cost plus" contracts. We have been all over the lot, your Honor, in this case without getting down to the point. Let's speak firmly. These are not "cost plus" contracts.

109 Now, what I asked this gentleman was this: Who prepared the bids? They amounted to two million seven hundred-some thousand dollars. On the work under these contracts, under his own figures, he says that they wound up with a profit of $3,000, $3,800, on $3,000,000 worth of work, and if you add the gross income tax to it, Herlihy was $29,000 in the red. That's the way I understood this testimony. What I am asking this gentleman is, does he know of his own knowledge, or have anything to do with this, to find out whether in all of these figures there was some provision made for this Indiana Gross Income Tax.

Mr. McNally: I don't want to prolong this, if your Honor please, but let's take K-814. The provision of the contract is that Herlihy first gets four per cent or $9,000 for overhead and profit. Then the next item he gets is a fixed equipment rental of $7,000. And then the contract goes on to say that he will be paid the net costs as hereinafter defined, and then it defines all of the net

110 costs.

Now, those net costs were in billings every month to the defendant. They were checked by Sargent & Lundy. These were actual costs that Herlihy had to show were incurred on the job site. Now, how could there be any burial of any Indiana Gross Income Tax in any figures under Contract 814?

The Court: Well, I would say that unless you are prepared to show there was such a disguise—

Mr. Friedrich: Manifestly, I couldn't show that.

The Court: —or that it came in under some heading—if you are prepared to show that it was, that is one thing, but to just leave the implication is another.

Mr. Friedrich: I can't show it. It is all within the knowledge of the Herlihy Company, and I am asking this

gentleman, does he know anything about that, and that I have a perfect right to do.

The Court: Well, he says he wasn't around when 111 these bids were made, so I assume he doesn't know anything about how they were handled.

Mr. Friedrich: If he will say that he doesn't know anything, I will—

The Court: He did.

Mr. McNally: It is an unfair answer in the record if you say, are they buried, and he says "I don't know."

Now, let's take 814 and see whether there could be anything buried. I say that the record already made shows on 814, and I will discuss the others, if necessary, that there couldn't be any Indiana Gross Income Tax or any other costs buried that you didn't know about.

Mr. Friedrich: Well, here is a man that made a proposal. Let this man say whether or not the Indiana Gross Income Tax was in, or out, if he has any knowledge of it.

The Court: In or out of what?

Mr. McNally: That's not what you asked before.

Mr. Friedrich: Oh, yes, it is.

The Court: All right, re-ask it, and the other 112 will not be considered. Re-ask it.

Mr. Friedrich: Will you read the last question? I don't remember just how I put it. (Question read.)

The Court: You may answer.

A. I don't know that there were any total figures for a bid, for this purpose: It was a "cost plus" contract.

By Mr. Friedrich:

Q. Did you prepare on K-814 all of the invoices that went through on this job?

A. The invoices that went to Northern Indiana?

Q. Yes.

A. They were prepared under my supervision.

Q. Now, your equipment rental, you had a figure, as I understood you, under Contract K-814, of $19,311.66; is that correct?

A. That included fees and equipment rental.

Q. Well, how much was equipment rental and how much was fees in that figure of $19,000?

A. The equipment rental would be $3,000—no, wait a minute; I beg your pardon, $7,000.

Mr. McNally: You are giving round figures. Now,
113 you better point out where you get it, or it won't make sense in the record. It isn't $7,000—oh, yes, it is; I beg your pardon, $7,000 even.

By Mr. Friedrich:

Q. The contract calls for $7,000, doesn't it, for a fixed equipment rental charge on K-814; do you remember that?

A. That is correct.

Q. So when you tell me $7,000, that is the rental charge as set out in the contract; is that right?

A. That is correct.

Q. The difference between $7,000 and $19,311.66 is what?

A. That is the fees.

Q. The fees. Is that just called "fees" in this contract?

Mr. McNally: Will you let him see the contract?

The Witness: I don't have the contract in front of me.

Mr. Friedlich: Sure. We have got it here.

Mr. McNally: I will show him the copy attached to the complaint, Exhibit "A", K-814.

114 By Mr. Friedrich:

Q. Have you had the contract?

A. Yes.

Q. And the difference between the seven and nineteen is what?

A. On page 5 of the contract, paragraph (14), it reads: "Purchaser, in consideration of the undertakings and guarantees of Contractor and of the faithful accomplishment of the work, agrees to pay to Contractor an amount equal to the sum of:

"A. The 'Net Cost' of the work, as hereinafter defined in Clause 15.

"B."—which is what we are discussing—"A 'Fixed Fee' of Nine Thousand Dollars ($9,000), to cover overhead and profit, and

"C."—concerning equipment rental.

Q. This contract also provides, on page 7—turn to page 7, if you will, please.

A. I have it.

Q. It starts, "The 'Total Cost of the Work'," at the bottom of page 6, and then at the top of page 7 the last sentence in the first rhetorical paragraph is, "It is mutually agreed that there shall be no change in the Contractor's total Fixed Charge should the Total Cost of the Work, including the Total Fixed Charge, be between $211,500.00 and $258,500.00."

You see that, too, don't you?

A. That is correct.

Q. Now, what I am asking you about the Indiana Gross Income Tax, your costs here were between this basis, $211,500 and $258,500; now I am asking you, if you know, when your figures were prepared, whether or not the Indiana Gross Income Tax was taken into consideration when those figures were arrived at.

A. They couldn't be, because every invoice that Northern Indiana and Sargent & Lundy okayed had copies of payrolls and invoices attached thereto adding up to the total thereon.

Q. Now, the figures that you gave as to the profit and loss of the plaintiff here, not on this, they were figures for the total operation of the plaintiff company for the years that you gave, were they not?

The Court: He didn't give any profit and loss, as I recall it.

116 The Witness: No.

The Court: He gave gross income and gross cash receipts.

By Mr. Friedrich:

Q. All right. The cash receipts, take the total cash receipts for '48, '49, '50, and '51 that you gave, those were from the total operations of the plaintiff throughout the Midwest or where it worked, were they not?

A. That is correct.

Q. Did it work in many states, do work in many states in those years?

A. We are licensed to operate in four states, and at that time we were operating in three, namely, Indiana, Illinois, and Michigan.

Q. The other figures that you gave were from your total operations, your overhead, particularly, and general office expense for your main office, as you have described it, that was for all of the operations, whenever you conducted them in those four states in those respective years, were they not?

A. That is correct.

Q. Then you billed every month, approximately 117 every month, under each contract or under each extra order to Northern Indiana, did you?

A. That is correct.

Q. Mr. Smith, you said that you were a CPA, certified public accountant, is that right?

A. That is correct.

Q. And you testified as to the different items that con-

stituted overhead; do you remember that testimony that you just gave?

A. That is correct.

Q. As an accountant and a CPA, did you know about the decision of the Indiana Supreme Court in the case of *Ward* v. *Schnarr*, in the 189th Indiana?

Mr. McNally: I object to that, as being wholly immaterial, whether he ever heard of it, which I don't think he did.

The Court: He wasn't examined on direct, was he? He wasn't examined as to his knowledge of the legal aspects of the gross income tax law, was he?

Mr. Friedrich: Well, as I understand it, a CPA doesn't know about the legal affects, but he is familiar with some of the court decisions. I just wanted to know if he 118 knew about that one decision and its holding.

The Court: I think I will sustain the objection.

Mr. Friedrich: That is all.

The Court: Anything further?

Redirect Examination by Mr. McNally.

Q. With regard to Contract K-814, you testified that the fees, as distingiushed from equipment rental, were $12,311.66; that the fees and the equipment rental were $19,311.66; and the difference in there between the two is $7,000; is that correct?

A. That is correct.

Q. Is that the $7,000 referred to in the provision of the contract that you mentioned?

A. That is correct.

Q. I didn't clear it up; I think you have it right in your mind. The fee, fixed fee, under that Contract 814 is how much?

It was $9,000, isn't that correct?

A. I stated that under paragraph—$9,000.

Q. You stated $9,000?

A. That is correct.

119 Q. What makes up the difference between the $9,000 and the $12,311.66? Is it at 4 per cent of the difference between $258,000 and your total receipts under that contract of $344,603.19?

A. As the contract increased over a certain figure, you got an additional fee, and that is where the additional fee arose; it was by this additional percentage applied to the additional cost.

Q. The Indiana Gross Income Tax doesn't enter into that at all, does it?

A. Absolutely not.

Q. Now, Mr. Friedrich asked you about the billing, your approving the billing. He didn't show you the bills. But I want to ask you, if you know, if you recall, what were the billings with relation to the Indiana Gross Income Tax; what happened in regard to that, if you know?

A. As I recall, the bills will substantiate that, on the first bill rendered there wasn't any Indiana Gross Income Tax, but on the next two monthly bills the Indiana Gross Income Tax was added, and it was also added for the month which was skipped, which was the first billing.

120 And then, at their insistence, it was dropped off.

Q. At whose insistence?

A. Northern Indiana's.

Q. On what basis?

A. On the basis—

Q. Or understanding.

A. The understanding that I remember Mr. Herlihy telling me—

Mr. Friedrich: I object to anything that Mr. Herlihy told him.

Mr. McNally: You can't state that.

Mark these Plaintiff's Exhibits 12 to 14, inclusive.

(Said instruments were marked Plaintiff's Exhibits 12 to 14, both inclusive.)

By Mr. McNally:

Q. I show you papers identified as Plaintiff's Exhibits 12 to 14, both inclusive, and ask you to state whether they were the bills that were initially sent, beginning with September, of 1948, which show the billing of the item of Indiana Gross Income Tax?

A. That is correct.

Q. Now, you cannot relate the conversation that
121 you had with Mr. Herlihy. I want you to state, just from your own knowledge, if you know, would Northern Indiana Public Service Company make any payments listed on the billings if Herlihy Mid-Continent Company kept insisting on putting on the Indiana Gross Income Tax as one of the items of cost?

Mr. Friedrich: We object. It calls for the conclusion of the witness. It supposes something that is not in evidence.

The Court: Well, let me ask you gentlemen, you know the facts, what is the fact about this?

Can't you agree on that phase of it?

Mr. Friedrich: I think we can agree, we can agree to this extent: We never paid any Indiana Gross Income Tax to Herlihy.

Mr. McNally: That is right.

The Court: They started to bill you for them, and then what happened?

Mr. Friedrich: Well, that's a long story.

122 The Court: Is it material, as to what happened?

Mr. Friedrich: It is going to be very material, and that is part of our case.

Mr. McNally: I didn't think it was going to be, but when Mr. Friedrich started asking the witness about the

billings, and saying "You approved the billings," I knew that he was going to argue later on, when the billings were in evidence and Mr. Smith was gone from this courtroom, that he approved the bills without this Indiana Gross Income Tax item in each one.

The Court: What is the question now?

(Question read.)

The Court: Well, do you know whether or not they would pay you if you billed them for the gross income tax as one of the items?

The Witness: They would not pay the Indiana Gross Income Tax on those bills—they wouldn't pay the bill with the Indiana Gross Income Tax on there.

By Mr. McNally:

Q. Do you know what the fact is as to whether they 123 ever struck out some of these on the bills?

A. The detail was that it was too much of a volume to retype the thing and send them a corrected bill, so we agreed with them that they could just make the correction on the invoice at that particular time.

Q. And then the bills for a long period of time were sent out without the Indiana Gross Income Tax as an item on the bill; is that correct?

A. That is correct. That did not mean that it was settled.

Mr. McNally: No, I know that.

Mr. Friedrich: Well, now, I will object. That is a self-serving statement.

Mr. McNally: That may go out.

Mr. Friedrich: We move that it be stricken out.

By Mr. McNally:

Q. Subsequently, were there bills sent by the plaintiff to the defendant, Northern Indiana, for all of this income tax?

A. Yes, sir.

Mr. McNally: Is there any dispute about that? There are a number of them here. Can we agree on that?

124 Mr. Friedrich: We can't agree on anything with reference to your building. We have the billings here, and I presume you have them.

Mr. McNally: Without putting them in, can we agree that subsequent to this period where the Indiana Gross Income Tax did not appear on the monthly bill, that bills were sent by the plaintiff to the defendant for all the gross income tax we are claiming?

Mr. Anderson: No.

Mr. McNally: Will you mark these documents as Plaintiff's Exhibits 15-A, and so on?

(Said instruments were marked Plaintiff's Exhibits 15-A to 15-V, both inclusive.)

By Mr. McNally:

Q. Mr. Smith, I show you bills of Herlihy Mid-Continent Company to Northern Indiana Public Service Company, photostatic copies of bills, that have been identified as Plaintiff's Exhibits 15-A to and including 15-V, and ask you to state whether the originals of such bills for Indiana Gross Income Tax on the contracts were sent to the Northern Indiana Public Service Company on or

125 about the date of these bills.

A. That is correct; they are.

Mr. McNally: I offer in evidence, if the Court please, Plaintiff's Exhibits 15-A to 15-V, both inclusive.

Mr. Friedrich: Of course, those are photostatic copies. Where are the original bills?

Mr. McNally: You have the original bills.

Mr. Friedrich: We will check them. Otherwise, for the purpose of the record, we object to photostatic copies. The original bills are the best evidence.

The Court: I suppose the original bills would be the ones that were sent to you.

Mr. McNally: That is correct.

Mr. Friedrich: As I understand it, your Honor, there were five duplicate originals. Of the carbon copies, each one of the five was an original.

The Court: Well, of course, that has in it a matter of terminology, I suppose.

The one that the typewriter hit, where is that one, 126 where is that copy?

Mr. McNally: 15-U and V—

The Court: I am talking about the original, the so-called ribbon copy.

Mr. McNally: They have those.

Mr. Friedrich: We have some, and if you give us time to check your photostats against what we have, if that's in there, we will have no objection, if you want to put them in. We just need a little time.

Mr. McNally: I only want to put them in if you persist in your position that you didn't get these bills.

The Court: I am going to overrule the objection, with the provision that if anybody insists on the originals, whoever has those originals will have to produce them, so if you are insisting on the originals, and they belong to you, and you have them in your files, you will have to bring them in.

Mr. Friedrich: They are here. All I want to do is take time to check the photostats against what we have got.

The Court: All right; they are admitted subject 127 to that check.

(And thereupon PLAINTIFF'S EXHIBITS 15-A to 15-V, both inclusive, were admitted in evidence, in accordance with the statement of the Court.)

By Mr. McNally:

Q. To support the Court's ruling, these were kept as part of the records and files of the Herlihy Mid-Continent

Company in the regular course of its business, were they not?

A. That is correct.

Q. Some were photostated, some were not photostated?

A. That is correct.

Q. Now, to make the record clear, too, when consideration is given to these bills, it was my mistake, I gave them all to the court reporter to identify as exhibits, we found there were one or two duplicates; is that correct?

A. That is correct.

Mr. McNally: Now I wish to offer in evidence, because I know I identified them but didn't offer them—I have them identified, your Honor, I don't think I offered 128 them—Plaintiff's Exhibits 12 and 13.

The Court: Did Mr. Friedrich see them?

Mr. McNally: There are several sheets that are part of one exhibit.

By Mr. McNally:

Q. Let me ask you, these yellow sheets, were they sent?

A. No.

Mr. McNally: I will take those off. They have not been marked particularly.

By Mr. McNally:

Q. Is what is on the yellow sheet, as far as the Indiana Gross Income Tax is concerned, reflected in these other bills? These are the bills first sent in October, '48.

A. Will you state your question again?

Q. Are the notations as to the Indiana Gross Income Tax on these yellow sheets reflected in the bills that have been identified?

A. That is correct.

The Court: So that the yellow sheets, for the purpose of the record, are withdrawn as part of the exhibit?

Mr. McNally: Yes, your Honor.

129 Mr. Friedrich: We make the same objection. We want a little time to check on these.

The Court: Plaintiff's Exhibits 12 and 13 are admitted, subjected to checking by defendant's counsel.

Mr. Friedrich: There are 12, 13, and 14.

Mr. McNally: I offer 14.

The Court: All right; 12, 13, and 14 are admitted, subject to defendant's checking.

(And thereupon PLAINTIFF'S EXHIBITS 12, 13, and 14 were admitted in evidence, in accordance with the statement of the Court.)

By Mr. McNally:

Q. Now, when Mr. Friedrich asked you on cross-examination if you approved all these bills as they went out, and you said yes, and Mr. Herlihy, Senior, deceased, knew about them, did you approve them in the sense that you did not expect to get the Indiana Gross Income Tax?

Mr. Friedrich: Well, I will object. That calls for a self-serving declaration.

By Mr. McNally:

Q. Why did you approve them without the Indiana
130 Gross Income Tax being included in those bills which were sent out over a period of time?

Mr. Friedrich: The defendant objects, for the reason that it calls for the conclusion of the witness, and, secondly, because it is a self-serving declaration on the part of the witness.

The Court: It may be self-serving, but it is not self-serving in the sense of a declaration, it seems to me.

Mr. McNally: He is not a plaintiff.

Mr. Friedrich: The question is what he expects.

Mr. McNally: It is not self-serving by the plaintiff. You opened the door. As his Honor said this morning, I opened the door to something. Now, I think you opened the door to this. You want it to appear, I think, from

the record that he approved these bills that you did get that did not have included in the cost the Indiana Gross Income Tax. Now, all I want to do is clear up the record on that phase of it, why they were excluded, and why he sent those bills out in this capacity as head ac-
131 countant and auditor with those exclusions. There is a reason for it. All I want is this record to show that there was a good reason, and the reason came from the defendant.

The Court: What is the question? (Question read.)

The Court: Well, I will overrule the objection. Go ahead.

A. Northern Indiana refused to pay the bills with the Indiana Gross Income Tax on there.

Mr. McNally: That is all.

Recross Examination by Mr. Friedrich.

Q. Just a few questions, Mr. Smith.

Now, the original invoices, they were prepared in five parts, were they not, carbon copies?

A. There were a number of copies. Our usual procedure is about five. In this particular instance, I don't—

Q. When you say copies, those were carbon copies?

Mr. McNally: Please let him finish.

The Witness: In this particular instance, I don't
132 know whether there were four or five, but it was for whatever you people asked for.

By Mr. Friedrich:

Q. And they were all carbon copies?

A. Oh, no; no.

The Court: Let's get that straight, so that we know what we are talking about.

What do you mean by your answer that they are not carbons? What do you mean by the negative in that answer, Mr. Smith, when you say they are not carbons?

An original is the one that the typewriter contacts, and then the one that has to do with carbon paper, is that what you call a copy? What do you mean by an original and copy?

The Witness: The original is the one that the typewriter makes the impression on.

The Court: All right.

The Witness: And that was mailed to Northern Indiana.

By Mr. Friedrich:

Q. Just one?

A. Oh, no; with the additional copies, whatever
133 you requested.

Q. Now, those additional copies requested were carbon copies of this one that you called the original, were they not?

A. That is correct.

Q. All put through the typewriter at one time?

A. That is correct.

Q. And did Herlihy Mid-Continent keep a copy for its files, its office files?

A. Yes.

Q. Were they there when you left the employment, I mean the invoices for the job for Northern Indiana, were those invoices up in the office when you left?

A. When I left there, I couldn't go check to see if all customer's invoices were in the files. That would be—

The Court: Well, presumably—

The Witness: Presumably, as far as I know, they were there.

By Mr. Friedrich:

Q. All right; I hand you what have been identified here as Plaintiff's Exhibits 12 and 14, and ask you to look at them, and tell us whether those were copies or
134 duplicate originals that Herlihy kept in its office.

The Court: A duplicate original is what, a carbon copy?

Mr. Friedrich: A carbon copy.

The Court: And a copy is made after the original was made with carbon copies?

Mr. Friedrich: The original was made with carbon copies.

The Court: Now, what is the question? (Question read.)

A. These are copies.

By Mr. Friedrich:

Q. And they are from the files of the plaintiff company, from its main office; is that right?

A. That is correct.

The Court: Now, when you say "copies," you mean carbon copies of the original?

The Witness: Carbon copies of the original.

By Mr. Friedrich:

Q. Then is it true that on all of the invoices billed Herlihy had in its files carbon copies of the bills that were sent to Northern Indiana?

135 A. Yes.

Q. You said, as I understood you, in answer to Mr. McNally, "We agreed with them not to include it," speaking of the gross income tax. Who was "we"?

A. I would like for you to read that testimony, then.

Mr. Friedrich: Well, strike it out.

Q. Let me ask you this: In answer to a question by Mr. McNally, I understood you to say that "We agreed with them not to include it". Now I want to know, who is "we," who did you mean by saying "we"?

A. Well, we were told to leave it out of the monthly invoices.

Q. Who is "we"?

A. Representatives of the Northern Indiana Public Service Company.

The Court: No, "we," he is asking who do you mean by the term "we"?

The Witness: Well, in any—

Mr. McNally: Answer the question.

The Court: When you said that, who did you mean?

The Witness: It would be between Mr. Herlihy 136 and me.

By Mr. Friedrich:

Q. Mr. Herlihy and—

A. And myself.

Q. And yourself?

A. Yes.

Q. You and Mr. Herlihy agreed, then, is that right?

Mr. McNally: Agreed to what, Mr. Friedrich?

Mr. Friedrich: Well, I am somewhat confused.

By Mr. Friedrich:

Q. Anything that you and Mr. Herlihy agreed to was agreed between you up in the office, right, in Herlihy's office?

A. We were not agreeing, we were not agreeing that the Indiana Gross Income Tax was not an expense. We were trying to get money to pay our bills every month.

Q. What did you mean when you said "We agreed with them not to include it," what did you mean?

A. The Indiana Gross Income Tax.

Q. Well, let's take, who did you think was "them," "we agreed with them," who was "them"; who did 137 you talk to?

A. When—

Q. No; answer the question. Who did you talk to?

A. I'll answer your question.

Q. All right.

A. When this situation arose, Mr. Herlihy went down—

Mr. Friedrich: I move to strike it out, as not being responsive to the question.

The Court: I think I am going to let him tell his story as to what happened. It is going to come out sooner or later, anyway.

A. (continuing) Mr. Herlihy went down to the office of Northern Indiana and discussed the Indiana Gross Income Tax, and when he came back, we were to leave it out of the bill, to be discussed later. "We" refers to Herlihy Mid-Continent Company.

Mr. Friedrich: I object, and move to strike it out, your Honor. It is apparently a conversation that he had with Mr. Herlihy. He wasn't down to the Northern Indiana office, and he is attempting to state a conclusion which can only be based upon what Mr. Herlihy told him
138 about a meeting down here at the office.

The Court: Well, I am inclined to overrule it. If that is the basis of his action, I assume it is a matter of fact—not a matter of fact, I am not saying that it happened, I am not ruling on whether it did, or did not happen that way, but I think he can say what he did, and the basis for his action, so I will overrule the motion.

Mr. Friedrich: Well, finish the answer, then.

The Witness: I did finish it.

Mr. Friedrich: Then I move to strike it out, for the reasons stated.

The Court: Overruled.

By Mr. Friedrich:

Q. When was this agreement made?

A. Shortly after those invoices were presented—I say "those invoices," those are the ones that are exhibits—were presented to Northern Indiana Public Service Company for payment.

Q. You mean these invoices here. Were they presented about the time, the date, that they bear?

I am handing you Exhibits 12 and 14. Are these
139 the ones you are speaking about?

A. That is correct.

Q. Exhibits 12 and 14?

A. Yes.

Q. Were you at the meeting with Mr. Herlihy at the Northern Indiana office?

A. No, I wasn't there, but inasmuch as I prepared the billing I had to konw the information or I couldn't prepare the bill.

Q. You were not there?

A. No, sir.

Q. And you tell us that it was shortly after the invoices were presented. Now, which invoice is it?

A. I don't know the exact date; that I can't tell.

Q. Could you fix the date of this meeting by looking at the invoices?

A. Well—

The Court: What do you mean, the exact date, or approximately?

Mr. Friedrich: Approximately, as near as he can remember it.

A. All I can give you is an approximation.

By Mr. Friedrich:

Q. What is it?

140 A. It was somewhere around November 30th.

The Court: Of what year?

The Witness: 1948.

Mr. Friedrich: I think that is all.

Mr. McNally: I don't want to belabor your Honor with this point.

Redirect Examination by Mr. McNally.

Q. When you testified, in response to Mr. Friedrich's question, "We agreed not to include," was that not to include it on the bill, or not to include it in the cost?

Mr. Friedrich: I will object to that, your Honor.

Mr. McNally: Well, I don't know what your position is. Are you saying that we agreed not to charge, after these first few bills, that we dropped the matter, is that your position?

Mr. Friedrich: I haven't taken any position. I am simply taking what this witness said on this stand.

The Court: What is the question?

141 (Question read.)

Mr. Friedrich: To which we object. It is utterly immaterial. I was simply asking the witness, according to my notes, about the words he actually used on the witness stand.

Mr. McNally: I am not so sure that you are accurate about it; I won't dispute it, but I want this record to show what I gathered from his testimony. I don't know anything about the conversation, but I think the record mya be confusing, and that you may argue, Mr. Friedrich, that our witness Smith testified that Herlihy went to the Northern Indiana people and then came back and told him he had an agreement not to include this income tax.

Now, if you mean by that, not to assert a claim for it, or not to contend that we did not drop it, that is not the fact, as I will prove in a minute by a letter which you know that I have.

Now, Mr. Smith, can you answer the question?

Mr. Friedrich: You come with a letter in '52. What do you know about the agreement between Herlihy
142 and Northern Indiana?

Mr. McNally: I don't. I just want Mr. Smith to tell truthfully what happened.

The Court: Restate your question, and I will hear an objection, and rule.

By Mr. McNally:

Q. Mr. Friedrich asked you about some direct testimony that he said you gave, in which you said, "We agreed not to include the Indiana Gross Income Tax on the bills," or substantially that.

Then you told about a conversation you had with F. J. Herlihy, the president of this company, now deceased, where he talked to the Northern Indiana people, without you present, came back, and gave you apparently some instructions, or you agreed about something.

Was that to drop the Indiana Gross Income Tax, or just to eliminate it from future bills?

A. To eliminate it—

Mr. Friedrich: Now, wait a minute. To which we object. It is not proper redirect examination. Secondly, it calls for a conversation between Herlihy and this witness, who was an employee of the plaintiff corporation.

143 It is a statement by which the defendant would not be bound, and it would be a self-serving declaration. Thirdly, the agreement, as shown by the question, was an agreement between Herlihy and the witness, as per an instruction to the witness, and not binding on the defendant.

The Court: If all this has to do, and it has been questioned by both parties, as to what was the subject matter of this conversation between Mr. Herlihy and the witness, I think I am going to permit him to say what it was, what they talked about, and whether it had to do with the owing of it, or the mere billing of it.

For that reason, I will overrule the objection.

Read the question.

Mr. Friedrich: I will just add one more reason to the objection, that it is hearsay.

(Question read.)

A. This agreement was just to temporarily eliminate

it from the monthly billing in order to expedite the billing and the payment, because we couldn't have an item
144 on there that dragged on month after month.

Mr. Friedrich: We now move to strike out the answer, for the reasons stated in the objection to the question.

The Court: Objection overruled.

I think I will ask you a question on this.

Do you have a further question?

Mr. McNally: No, I don't, your Honor.

The Court: Just to clear this matter up—perhaps this will help to clear it up—do you remember how you carried it on the books, even though you didn't bill it to Northern Indiana, do you remember how it was carried on your books?

The Witness: It was not carried on the books until we had billed it at the end of the job.

The Court: You didn't carry it month to month?

The Witness: No, because the entry on the books agreed with the bill presented, and then when we did present the bill, the Indiana Gross Income Tax, then that was entered.

145 The Court: But not until the total bill of the gross income tax did it show up on your books?

The Witness: That is correct.

The Court: But did you pay Indiana?

The Witness: We had paid Indiana quarterly.

The Court: That is all.

By Mr. McNally:

Q. Was there any reason why you wouldn't note it on the books?

Mr. Friedrich: I will object. That calls for a self-serving declaration. It calls for a conclusion of this witness. It is not a fact that he is calling for; it is an interpretation, his own interpretation.

The Court: Well, I will overrule it, if it has to do with an accounting question.

Mr. McNally: That is what I mean, as an accounting matter.

By Mr. McNally:

Q. Why wasn't it necessary, or was it necessary, to have it on the books?

A. It wasn't necessary.

146 Q. Why, as an accounting matter?

A. Because theoretically—we are speaking theoretically now—until you had presented them with a bill, it theoretically had not been billed, and you do not necessarily make entries until an item has been billed or performed.

Mr. McNally: That is all.

Recross Examination by Mr. Friedrich.

Q. Now, wait a minute. Here are bills, some dated in October, 1948; October 30, 1948, and here is one November 16, 1948.

Now, you had billed them. Here is one November 30, 1948. You had billed them, hadn't you?

Yes, and all these in '51. You had billed them?

A. As we billed them, we entered them, yes.

Q. But you didn't put them on the books until the job was all through, did you?

A. As we presented bills to you, they were entered on the records.

Q. So that you mean to say now that your books showed an item of Indiana Gross Income Tax as these invoices were put out?

147 A. That is correct.

Q. Well, then, what did you mean when you just told his Honor that you carried that as a suspense until the job was done?

A. I didn't make that statement.

Q. Well, that's the way I understood it. That was not done, then?

The Court: What was not done?

Mr. Friedrich: That it was not carried on the books until the end of the job.

A. I made the statement that it was entered on the records when we billed it.

The Court: Well, now, let's get it straight. These first items, when you first started to bill, the gross income tax was put on there?

The Witness: That's right.

The Court: And that showed up on your books?

The Witness: That is correct.

The Court: Then, according to your version of it, Mr. Herlihy came down to Hammond, and he came back, and you had your talk; and then after that time you didn't bill them?

148 The Witness: That is correct.

The Court: So it didn't show up on the books?

The Witness: It didn't show up as a part of that monthly billing, which included labor—

The Court: When I say it didn't show up on the books, I mean you didn't then put down Northern Indiana owes so much for gross Income tax after that?

The Witness: No, not until—

The Court: I mean, you didn't put it on your books that way, per bill?

The Witness: Now, wait a minute. On our monthly billing, there is one figure used, and whether that included payrolls or gross income tax, or what it included, it would be one entry for the gross amount of that bill.

The Court: But in subsequent months, after you didn't include the gross income tax, it didn't show up that way?

The Witness: No, it didn't show up until such time—

The Court: Until later, when you put in a separate bill?

149 The Witness: Separate bill, we put in a separate bill for Indiana Gross Income Tax only, and then that bill was put on our books.

The Court: Was put on your books?

The Witness: That's right.

By Mr. Friedrich:

Q. I may be dense. Did you put the item through on your books then under the dates that all those billings bear that I showed you, October 30th, November 16th, November 30th, 1948, and under the photostats through the year 1951, were those all separate items in your books?

A. Yes, they are.

Q. Then there wasn't one general item when the job was done, Indiana Gross Income Tax, a certain amount of dollars?

A. No, sir.

Q. So then these were on your books, your ledger which you have here, an entry was made on the date that these bills bear?

A. Well—

Q. Is that right, for Indiana Gross Income Tax?

A. Well, let me answer that question this way:

150 The normal procedure would be to enter bills, once they were presented, and that procedure was largely followed in this—now, I don't have the entries in front of me, but I know that there were a number of entries made in the records for Indiana Gross Income Tax, and normally they would agree specifically with the bills as rendered.

Mr. McNally: Let the record show I have now handed to Mr. Friedrich from the original record of Herlihy the entries that the witness has testified to.

Mr. Friedrich: I am trying to cross examine this witness on statements that he has made.

The Court: Well, go ahead.

Mr. Friedrich: I don't know how you people handled it. We are not bound by it.

By Mr. Friedrich:

Q. The way you have explained it this last time is the way you handled it as office manager and chief accountant for this company?

A. That is correct.

Mr. Friedrich: That is all.

151 Mr. McNally: I am not going to introduce them, but you can have them, if you wish, to look at.

Redirect Examination by Mr. McNally.

Q. I hand you now sheets just now taken from the records. Are those entries of the type that you have been discussing, showing Indiana Gross Income Tax under these contracts?

A. These are the entries.

Mr. Friedrich: Well, I will object, your Honor. I don't know whether they are books of original entry; I don't know under whose control they have been.

Mr. McNally: The witness has testified that they were under his supervision.

Mr. Friedrich: When they were prepared.

The Court: Well, there is nothing before the Court.

Mr. Friedrich: Well, I move to strike out his answer that he made to Mr. McNally, for those reasons, and that is before the Court.

152 The Court: Well, I am going to overrule it, but I will let you examine him, and you may examine the records in order to ascertain if these are the originals, and their authenticity.

Mr. Friedrich: I am through examining the witness.

Mr. McNally: That is all.

(And thereupon the witness was excused.)

Mr. McNally: If your Honor please, I have no further witnesses.

(An instrument was marked Plaintiff's Exhibit 16, for identification.)

Mr. McNally: I offer in evidence, as Plaintiff's Exhibit 16, a copy of a letter which, under a notice and request for admissions, the defendant admitted it received from Herlihy Mid-Continent Company and that no reply thereto was made.

Mr. Friedrich: We received the letter, your Honor.

Mr. McNally: I offer it.

The Court: Any objection?

Mr. Friedrich: No, your Honor.

153 The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 16 was admitted in evidence.)

Mr. McNally: I would like the Court to read it.

The Court: Do you rest?

Mr. McNally: No, I have one more.

I now offer in evidence a regulation, or part of a regulation, of the Department of Revenue of the State of Indiana, Tax Department, concerning the Indiana Gross Income Tax. It has been admitted by counsel for the defendant, and to it he has added a further regulation, which I will have no objection to his reading in evidence, if he wishes to, on his side of the case, but I would like to read this in evidence:

"Regulation 404 of the Regulations of the Indiana Gross Income Tax Department promulgated by the Indiana Gross Income Tax Division as of April 27, 1946, and in force and effect on and prior to October 13, 1948, October and

various dates up to '49, and so on, and in effect, it is
154 in effect as of the present time.

"Passing the tax on"—this is the quote—"Since the Gross Income Tax Act is silent upon the matter of adding this tax to the selling price or charges; the adding of such tax to such selling price or charges must be entirely a matter of contractual agreement between the buyer and seller, and the Division will therefore neither authorize the adding of the tax nor condemn the failure to do so and will look only to the taxpayer for the tax upon his total gross receipts."

Mr. Friedrich: Now, I think—why don't you—

Mr. McNally: If you want to add what you want, I have no objection to your doing it now, so that it will be in the record at the same place, but this is your offer.

Mr. Friedrich: Well, it is the law that if you offer a regulation, you offer it; you offer the entire regulation, and not just pick out a part of it that suits you, and not the others that do not.

155 The Court: Well, does it make any difference who offers it?

Mr. Friedrich: No. I have admitted it. Here is the whole. If he will just read the rest of the regulation, I will have no objection.

Mr. McNally: You have it on our notice. We haven't got it. It is the second section.

The Court: You don't have it to read?

Mr. McNally: I have it here some place. Have you got it?

Mr. Friedrich: Yes, I have.

Mr. McNally: You read it, and I'll agree.

Mr. Friedrich: "Since taxpayers are not made the agents of the State to collect gross income tax, any amount paid as the tax and collected by a taxpayer must be considered as an additional price received and it will

be part of the gross receipts of the taxpayer and must be reported as taxable income."

That's the entire regulation.

Mr. McNally: I will agree that that is also part of the regulation I read.

156 The plaintiff rests, with this exception, that it asks this Court, under the federal authorities, to take judicial notice of the statutes of the State of Indiana of the pertinent years in question to the effect that there was not, and is not, any tax imposed by the State of Indiana that could have any relation whatsoever to the issue in this case other than the Indiana Gross Income Tax, and I make that offer in view of the language of the disputed clause in the contract.

The Court: I assume that that would be a matter of argument, and not a matter of evidence: The Court takes judicial knowledge of the statutes of Indiana, positive or negative statutes, and what they do include, and what they don't.

Mr. McNally: With that, the plaintiff rests.

The Court: Can you finish tomorrow?

Mr. Friedrich: Well, we can go a long ways.

The Court: Well, we have got three days. Do you want to go ahead any more today?

157 Mr. Friedrich: It is four twenty-five. I would rather start a little bit earlier in the morning, if it is all right with counsel, or start at nine thirty or ten; I think we will make better headway, rather than starting tonight.

The Court: Do you want to go any more today, Mr. McNally?

Mr. McNally: I don't, but whatever the Court wants.

The Court: I don't particularly want to, except I want to get through in three days.

Mr. Friedrich: We are going to get through in that time.

The Court: All right; ten o'clock in the morning.

(And thereupon a recess was taken until Tuesday morning, February 21, 1956, at ten o'clock.)

158 And on Tuesday, February, 21, 1956, at ten o'clock A. M., the trial of said cause was resumed, pursuant to adjournment.

Present: The same as before.

The Court: You may proceed.

Mr. McNally: Mr. Friedrich, on Plaintiff's Exhibit 16, admitted in evidence, I stated in introducing it that there had been no reply. In discussion with Mr. Nash going home last night his recollection and then mine was that while Mr. Friedrich admitted receiving it, he inadvertently did not admit that there was no reply. I wanted the record to show there was no reply.

Mr. Friedrich: We made no reply to that letter, as far as I know.

And thereupon the defendant, to support and maintain the issues on its behalf, introduced the following evidence:

Mr. Friedrich: Mr. Hartman, will you take the stand?

ARTHUR J. HARTMAN, a witness on behalf of the
159 defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. State your name.

A. Arthur J. Hartman.

Q. Where do you live?

A. 2205 Nondorf Street, Dyer, Indiana.

Q. What is your business or occupation?

A. I am assistant purchasing agent of the Northern Indiana Public Service Company.

Q. How long have you been employed by the defendant company?

A. Since 1924.

Q. And as purchasing agent or assistant purchasing agent, what, if anything, did you have to do with the contracts that are in suit in this case?

A. We handled the paper work clearing through the purchasing department.

Q. Did you handle it on all of the contracts that are in suit in this action?

A. Yes, sir.

Q. Now, Mr. Hartman, there are some statements in evidence that were statements prepared by the plaintiff and then sent to Northern Indiana for work, labor, 160 and taxes, as you have seen here yesterday under Exhibits 12 to 14; is that correct?

A. Yes, sir.

Q. Now, would all of the Herlihy statements in connection with these contracts that are in suit in this case come to your office and to your attention?

A. The papers in connection with this suit, you say?

Q. The contracts in connection with this suit—Herlihy's statements under the contracts in this suit, would they come to the purchasing department?

A. I would like to clarify "statements". Do you mean the invoices or billings?

Q. Yes, let's call them invoices.

The Court: Well, I am not so sure that I know accounting practices. What is the difference between a billing and an invoice, if any?

The Witness: Well, an invoice, as we in purchasing look at it, is a current billing that has come through for payment. A statement is generally issued by a company at

the end of the month showing the outstanding accounts that they hold against a client.

161 The Court: Well, billing and invoicing seem to be pretty much synonymous in the common parlance of business and accounting methds?

The Witness: To the best of my knowledge, yes.

By Mr. Friedrich:

Q. Then let me ask you, the invoices under these contracts that are in suit here, were they sent and did they go to your department?

A. They came to our department in the course of approval. The invoices in question of Herlihy Mid-Continent Company were submitted in quadruplicate to our office at Michigan City.

Q. All right; that is the next question that I was going to ask you. Will you briefly explain the procedure that was followed in processing or handling the invoices of the plaintiff under these contracts in suit here?

A. They were submitted by the Herlihy Company through our office at Michigan City.

Do you want an explanation of what they did at Michigan City with the invoices?

Q. Yes, please.

A. At Michigan City, they were to check as to
162 the material used and the hours charged. The rates of the contract were secondary, as far as Michigan City was concerned. They were to verify the materials used and the amount of hours billed.

After that verification, the invoices were forwarded to Sargent & Lundy, at Chicago, for their certification along the same line as Michigan City did.

Then from Sargent & Lundy, with copies of their certificate, the invoices were forwarded to the purchasing department of the Northern Indiana Public Service. We checked the invoices against the terms and conditions of

the contract, and if they were all satisfactory and met the conditions on which the contract was drawn the invoices were forwarded from the purchasing department to our accounting department for payment.

Q. And was that procedure followed in all of the invoices under the contracts in suit?

A. Yes, sir.

Q. Now, Mr. Hartman, let's go according to the different contracts, starting with K-814. When was the first invoice sent by the plaintiff under that contract?

A. The first invoice under K-814 was dated Sep-
163 tember 30, 1948.

Q. Did that particular invoice have any charge for Indiana Gross Income Tax?

A. No.

Q. After you received and processed that particular invoice, was it then paid by the company?

A. To my knowledge, it was paid, yes.

Q. Now, when was the next invoice sent under that particular contract by the plaintiff?

A. There was a second invoice, that we did not honor as an invoice, that there was a mistake that Herlihy had made, and on the retention, instead of deducting, they added it. That invoice was immediately returned to the Herlihy Company for correction, and the correction was submitted under date of November 16, 1948.

Q. When you speak of retention, you mean the retained percentage, fifteen per cent withheld?

A. It was five per cent, I believe.

Q. Five per cent withheld until the job was done, and then it was paid?

A. That is right, sir.

Q. Then the corrected invoice, was that the one of November 16th?

164 A. November 16th.

Q. 1948?

A. That is right, sir.

Q. Now, with reference to the Indiana Gross Income Tax, what did that statement or invoice carry?

A. That invoice carried the Indiana Gross Income Tax and endeavored to pick up the Indiana Gross Income Tax which they claimed was omitted from the original invoice, the invoice of September 30th.

Q. Then when was the next invoice submitted?

A. November 30, 1948.

Q. Did that statement carry the Indiana Gross Income Tax?

A. It did.

Q. After the submission of the invoice of November 30, 1948, state what occurred.

A. If permitted, I would like to bring one question that is important, I think. It took invoices from the time submitted by the Herlihy Mid-Continent Company three to four weeks before they were processed through our office, so that the invoices of November 16th and November 30th arrived practically simultaneously at our office, the invoices, the second and third ones which carried Indiana Gross Income Tax.

165 Q. Well, then, that would be in December?

A. That is right.

Q. 1948?

A. That is right.

Q. The latter part of December?

A. I would say probably, oh, from the 15th to the 20th would probably be a good estimated date that we got the invoices.

Q. And state the facts as to what then you did with reference to these invoices of November 16th and November 30th.

A. Well, these invoices carried the Indiana Gross In-

come Tax, and we have never paid the Indiana Gross Income Tax.

Mr. McNally: I object to that, and move that it be stricken.

The Court: That is struck.

Mr. Friedrich: Yes. I guess it is a fact, though, admitted in the case, that we never paid the gross income tax.

Mr. McNally: Let's not get into that. You paid Babcock & Wilcox.

Mr. Friedrich: Well, we are going to get into that.

The Court: Let's go ahead.

166 By Mr. Friedrich:

Q. Directing your attention, now, what did you do with reference to these invoices that carried the Indiana Gross Income Tax?

A. Well, the contract, in our estimation—

Q. The point is, did you take it up with the Herlihy Company?

A. Yes, sir.

Q. When did you do that, when?

A. I called Mr. Herlihy shortly after receiving these invoices and requested that we would meet—

Mr. McNally: I object to any conversation with Mr. Herlihy. The record already shows that he is dead.

Mr. Friedrich: Well, your Honor, that is no reason to make this evidence incompetent.

The Court: Well, this so-called dead man's statute, if that is what you are referring to, I don't know about its applicability. If you want to raise it and argue it, I will hear you. I am not sure that it is applicable myself, until I hear your arguments and examine the statute.

167 Mr. McNally: I presume your Honor will leave it in, subject to our objection?

The Court: No; I think we ought to thrash that out right now, if you want to.

Mr. Anderson: It is part of our case.

The Court: Just to raise the question—I want to hear your arguments on it and whether or not the statute is applicable, if you want to insist on it.

Mr. McNally: If the Court please, I haven't any authorities, and certainly under—

The Court: Do you want to take the time out to check it? I will give you time.

Mr. McNally: Not necessarily. I believe the Indiana statute is the same as our own and that the general rule definitely is, as stated in the statute, if the party is dead, that the conversation is not admissible. I don't perceive why this conversation which is sought to be elicited from this witness would be an exception to that rule.

The Court: Well, let's hear Mr. Friedrich. Apparently he says it is not applicable.

Mr. Friedrich: My view of it is this: Of course,
168 there is nothing to exclude this testimony. This is a suit between two corporations, an Illinois and an Indiana corporation. We do have the statute here, what is called the dead man's statute. It refers, by its terms, only to estates and to suits by executors or administrators or by heirs relating to a decedent's estate. Our statute goes no farther than that. In that particular, it is different than your statute in Illinois.

Since this is a suit in Indiana where it is not between an administrator or an executor or any heir, you see, the prohibition set up by this statute does not apply. Here is a suit, a plain suit. It could not certainly be said that corporations that have officers die, that simply because a corporate officer dies that corporation can't go into its business transactions, so as we view it there is positively no prohibition, and the statute doesn't apply.

We can get the statute, so that you can see it.

169 The Court: Well, perhaps you better satisfy yourself.

Mr. McNally: All right.

The Court: Will you get the statute?

Mr. Friedrich: I just want to make this observation: While the direct testimony yesterday wasn't in, yet it was in inferentially as to the instruction that Mr. Herlihy gave to Mr. Smith up in the office.

Mr. McNally: The Court, as I recall it, elicited that after you had cross examined Smith. I did not on direct examination ask Smith about any conversation.

Mr. Friedrich: Well, the record will show what it was, but I know, without quoting the conversation, there was testimony here that you elicited from Mr. Smith as to these billings, and under instructions from Herlihy.

Mr. McNally: Well, that arose on cross examination.

Mr. Friedrich: Are you familiar with our statute?

The Court: I have sent for it, Mr. Friedrich.

170 I don't suppose that the latter observation, the fact that the plaintiff was permitted to bring out conversations with the deceased person, even though it was with a different party, and you didn't object, would be—

Mr. Friedrich: I objected, I was trying to object.

The Court: You didn't object on that ground, though, did you? Well, maybe you did.

Mr. McNally: But I didn't attempt to bring out with Smith the whole conversation with Herlihy. As I understood the Court's view, it was a matter of instruction from Herlihy to his head accountant or auditor.

The Court: I am not so sure that Mr. Friedrich didn't object on the ground that one of the parties to the conversation was deceased.

Mr. McNally: I think he did object, that is my recollection, not on that ground, but on the ground of hearsay.

Mr. Friedrich: No, I never objected on the ground that he was deceased, because I didn't think—I am positive
171 in my own mind as to our own statute and its application, so I wouldn't object on that ground.

The Court: I don't think I will take a recess, unless you want to look at the authorities. If you do, why then we will take a recess. We will take a look at the statute, which will be here in a minute, I think.

Mr. McNally: Is there an evidence statute?

Mr. Anderson: Ours is under "Witnesses", that is the only statute we have.

You don't need to take my word for it; you can go out and examine the index. That is the only one that I know of.

Mr. McNally: While the statute in Indiana may be persuasive to the Court, I think that inasmuch as it is a federal procedure, federal rules would govern.

The Court: There is no federal statute on it, I am sure of that.

Mr. McNally: No, there is not, as far as I know. The basis of the rule, however, is that there is no way, because Herlihy is dead, that we can counter this man's tes-
172 timony about the conversation.

The Court: Well, the exclusion comes about, as I understand it, by virtue of statute. If there is no statute applicable, then it is competent evidence; do you concede that?

Mr. McNally: No, not altogether. I am speaking now from recollection. I think that at common law the rule prevailed, and the statute in Illinois and I presume here to a certain extent codified the common law rule.

The Court: Well, we have got Wigmore. We will take out five minutes. You look it up, if you want to.

(A short recess was taken.)

Mr. McNally: I haven't found much, Judge. In Wigmore, in Volume Five, it says, i neffect, that there was a general rule that all statements of decedents were excluded initially. I am reading from page 435:

"There was a time, in the early 1800s, when it came near to being settled that a general exception should exist for
all statements of deceased persons who had competent
173 knowledge and no apparent interest to deceive; but
this tendency was of short duration and was decisively negatived." Those cases apparently are English cases. "Nevertheless, such an exception, uniting as it does the essential requirements of an exception to the Hearsay rule, commends itself as a just addition to the present sharply defined exceptions, and represents undoubtedly the enlightened policy of the future." Then Wigmore goes on and cites a Connecticut statute making an exception, Rhode Island, Alaska, Massachusetts, and Oregon.

Now this of course is a quick judgment on it. It seems to me that the general common law rule, which was that statements of a decedent could not be testified to, Wigmore thinks is an unenlightened policy, and he points out statutes which have carved it out. My position would be, therefore, if my interpretation is correct, that what the Indiana statute may do, even though it may be persuasive in the absence of any other general rule, is simply to provide for witnesses in litigation involving decedents' estates, and if there is or was a general rule at common law that no one could testify to statements of a deceased person, as I assumed the rule was before this controversy started,
174 and I haven't been dissuaded by this, that all Indiana
did was make a specific provision as to witnesses in litigation involving estates of decedents and did not disturb the general rule that previously existed in ancient times.

Mr. Friedrich: Well, the reason we have our statute

in Indiana under the dead man's act is because under the common law the evidence of a deceased person was entirely admissible. The reason for the statute was to limit the common law and say that in estates and in suits involving executors and administrators you had no right to put in evidence the statements of a deceased person. Under the common law rule, you could always put them in.

Now, what do you have here, your Honor? Here you have a lawsuit between two corporations. Mr. Herlihy was the president of the corporation. We certainly have a right to prove a statement that Mr. Herlihy made, be he living or dead, because he is not a party to this lawsuit. Even if he were, the statement would be competent evidence. I know of no rule that would exclude this conversation as evidence. The Court might say, "Because Mr. Herlihy is dead, I am going to look into it very care-
175 fully," but if that would be the feeling of the Court, that would go to its competency, not to its admissibility. Under all circumstances you can prove statements of deceased persons, whether they are parties to the lawsuit or not. I never thought there would be any question about it.

I just picked up this American Jurisprudence under their title on Evidence, and I haven't examined the cases, but they say that it is admissible.

Mr. McNally: What page, Mr. Friedrich?

Mr. Friedrich: I am reading from page 521 now:

"In the absence of a statute, the death of a declarant is not in itself a ground for invoking an exception to the hearsay rule which renders unsworn statements inadmissible in evidence."

That is the same statement in the question that the Court asked of Mr. McNally.

Now, when you go over here to Section 609—no, the same section; I am reading now from page 522:

176 "If a declarant is dead, the general rule is that statements made by him against his pecuniary or proprietary interest are admissible even as between third parties." And then they go on and cite cases.

Now, here, the language that was read in Wigmore are instances where the dead person is a party to the lawsuit, and this here is a statement of where the dead party is a party to the lawsuit. Now, this says that the evidence is admissible even though he is a party to the lawsuit. It was always so under the common law, and our statute says, yes, the common law rule of letting it all in can never apply to estates or suits by executors or administrators. But here he is just the president of the corporation. How could the corporation do business? People die; they get sick. Wouldn't the corporation be bound by what its officers do, even though they die? Couldn't you inquire into those transactions? The law isn't that if an officer of a corporation dies, another party, a third party, under a contract with that corporation, cannot inquire into those circumstances.

177 I know of no rule to exclude it, and the research in this case says that it is admissible. Even in a suit by third parties, it is admissible. And certainly if it would be—that says pecuniary interest of Mr. Herlihy, of the declarant. Well, then, you would have to look through and say that he may have had stock in this corporation, it was named after him, he was the president, and, as Mr. Smith said, he was the man, the principal officer, he ran the business; you would have to look through and say that anything that Mr. Herlihy said may be against his pecuniary interest, so the evidence sought to be elicited is clearly competent under these rules in American Jurisprudence, under the common law, and there is no statute in Indiana, or any statute, there is no statute anywhere, that I know of, or that has come to my attention, where in a suit be-

tween two corporations, just because an officer of the corporation dies, the corporation can claim that fact to not go into particular transactions.

Mr. McNally: The only thing I have to add, your Honor, from what I read in Wigmore, it doesn't confine it to estates, on the pages that I was referring to.

178 The Court: The objection is overruled.

Will you read the question, please?

(The record on page 166 hereof was read.)

A. (Continuing.) The call to Mr. Herlihy was right around the 20th of December.

Mr. McNally: I didn't get the first part,—

(The answer was read.)

Mr. McNally: Did you make the call?

A. I made the call to Mr. Herlihy, and, due to the holidays coming, we set a date as December 28, 1948, for this meeting, which was on a Tuesday.

By Mr. Friedrich:

Q. Now, then, after this phone conversation, did you have a meeting with Mr. Herlihy concerning this gross income tax?

A. Oh, yes.

Q. When was that?

A. December 28, 1948.

Q. Where?

A. At our office in Gary. At that time the purchasing department's headquarters were at Gary.

Q. 500 Broadway?

179 A. 500 Broadway. Yes, sir.

Q. Who was present at this conversation?

A. Mr. Lindeman, our purchasing agent, Mr. Herlihy, and myself.

Q. Mr. Herlihy, was he the president of this Herlihy Mid-Continent Company, the plaintiff company?

A. F. J. Herlihy: that is right, sir.

Q. What time of the day did you have this meeting?

A. To the best of my recollection, about eleven in the morning.

Q. Will you state the conversation that occurred at this meeting with reference to the Indiana Gross Income Tax, stating as nearly as you can the exact language and words used by the participants, and those where you cannot speak the exact words, give the substance of them.

Mr. McNally: I object to the question, as being incompetent, upon the grounds previously urged.

The Court: Overruled.

Mr. McNally: May it be understood, so that I won't
180 have to be interrupting, that my objection shall go to all questions about this conversation.

Mr. Friedrich: Yes, like yesterday; I have no objection.

The Court: It may.

The Witness: May I inject one thought here, that at the time I called Mr. Herlihy for this meeting, I told him it was for discussion of the Indiana Gross Income Tax.

Mr. Friedrich: Yes.

The Witness: So getting to the meeting of the 28th, it wasn't something that we sprung on him without him knowing ahead of time.

Mr. McNally: I object to his conclusion.

The Court: Not your interpretations. Just, as best you can recall, state exactly what happened, and not your impressions or reactions.

A. At the time Mr. Herlihy was in our office, and after the greetings that we had, knowing the man for a long time, we got down to the question of the tax. Mr. Lindeman told Mr. Herlihy, we were ready to discuss the tax, and he turned it over to me.

I said to Mr. Herlihy, "This tax is a tax upon you as

a penalty for doing business in the State of In-
181 diana."

Mr. Herlihy's reply was, "I know what the Indiana Gross Income Tax is. Strike it off of the bills. We will not bill you for it."

Q. How long did this meeting last?

A. The meeting was about fifteen minutes, but the discussion of tax was just about as long as it took for me to tell you of the conversation of the tax.

Again, after that was decided, to tell us to strike it off, he sat there for a few minutes and said he had to go to Michigan City, so the duration of his time at our office I would say was fifteen minutes at the most.

Q. Now, after that meeting, and that same day, did you dictate a letter—

A. I did.

Q. —to Lawyer & Anderson?

A. Lawyer and Anderson, attention of Mr. Anderson.

Q. And they were the geenral counsel at that time for the Northern Indiana?

A. That is right.

(An instrument was marked Defendant's Exhibit 5, for identification.)

182 Q. I hand you here a letter which has now been identified as Defendant's Exhibit 5. Without stating any of its contents, is that the letter which you dictated right after this meeting with Herlihy?

A. That is right, sir.

Q. I notice the signature on the bottom is A. Lindeman?

A. That is right.

Q. Is that the Mr. Lindeman that sat in the meeting?

A. That is right.

Q. And was he the purchasing agent at that time?

A. Yes, sir.

Q. I notice at the bottom, to the left-hand corner, are

the initials "AJH:DS," Mr. Hartman. Are those initials "AJH" your initials?

A. They are.

Q. Because you dictated the letter?

A. That's right.

Mr. Friedrich: We offer in evidence Defendant's Exhibit No. 5, on the theory that it is corroborative of the direct testimony that has been made. This conversa-
183 tion occurred in 1948. It is cumulative, in showing that the witness's memory of the conversation back in 1948 is correct because of a memorandum that was made by him at that time.

Mr. McNally: I object to it. It is obviously incompetent. It is a communication between either this witness or Lindeman, I can't tell which from what was said, and their lawyer. How it could be binding upon Herlihy Mid-Continent Company, I can't perceive.

The Court: Well, in ruling on this, in the sense of its being an admission, it is not binding—

Mr. McNally: I haven't any objection to the Court seeing it, howeevr.

The Court: Well, I don't want to see it until I have ruled.

However, it seems to me that under these peculiar circumstances it is admissible. I would assume that the letter could be used by him to refresh his memory. There are kinds of recordings in which a past recollection is recorded, or a present recollection is refreshed by a
184 past memorandum. I would assume that this is that kind of a document. But it seems to me that it has other probative value, in view of the fact that one side of the conversation is all we are going to have here because of the death of the other party. Therefore, anything that was made contemporaneously at that time, even though

it is a self-serving declaration in a sense, has probative value.

Therefore, the objection is overruled, and the letter is admitted.

(And thereupon DEFENDANT'S EXHIBIT 5 was admitted in evidence.)

Mr. Friedrich: Does the Court care to read it?

The Court: Do you want to read it to me?

Mr. Friedrich: Yes.

"Lawyer and Anderson, 5305 Hohman Avenue, Hammond, Indiana, Attention Mr. R. S. Anderson.

"Gentlemen:

Herlihy Mid-Continent Company

"With reference to the meeting held in your office 185 under date of December 17, in which we discussed Indiana Gross Income Tax in connection with the Herlihy Contracts, we are plased to advise that we have held a meeting with Mr. F. J. Herlihy and he has agreed to omit the billing of Indiana Gross Income Tax from all invoices in connection with the Contracts at the Michigan City Generating Station.

"At the time we were in your office, you gave us Contract No. K-825 which we were to retain until the question of Tax was settled. We are now returning the three (3) copies of the above contract for your approval.

"If you have any further questions regarding this transaction, kindly advise.

Very truly yours,

A. Lindeman,
Purchasing Agent.

AJH:DS
Englosures—3"

Mr. McNally: I want to preserve my record. I move that the answer of the witness to the question as to the conversation be stricken, upon the grounds that I have
186 previously urged, and upon the further ground that no such defense was alleged in the defendant's answer. I take it that it is the position of defendant's counsel that an agreement was made by this conversation of a dispute over a provision that was in the contract. Now, any such defense that there was a new agreement about the Indiana Gross Income Tax should have been pleaded, and I think if it was pleaded I would have been better prepared on my law.

The Court: I am going to overrule your objection, but on this latter ground, you may argue it at the end of the case.

By Mr. Friedrich:

Q. After the meeting in Gary, what then did you do with reference to the invoices that were sent by the Herlihy Company, dated November 16 and November 30, 1948?

A. The tax was delected—

Mr. McNally: I object to that as a conclusion. He can say what was done.

The Court: The mechanical things, what happened, what occurred, that is the question.

187 A. Well, the tax was crossed off, let's say then, and the invoice sent through to Hammond for payment.

Q. And was paid without the—

A. Without the Indiana Gross Income Tax.

Q. —Indiana Gross Income Tax?

A. That's right.

Q. What was the date of the next invoice from Herlihy Company on this contract K-814?

A. December 31, 1948.

Q. Did that invoice have the Indiana Gross Income Tax in it?

A. No.

Q. Now, how many invoices did the Herlihy Company send to Northern Indiana on Contract K-814?

A. There were twenty-two.

Q. From December 31, 1948, until the end or the close of the contract, were there any further invoices showing Indiana Gross Income Tax?

Mr. McNally: I object to this. I don't want to be technical, but this is not the best evidence. I told Mr. Friedrich before that I would agree to the period of the billing that did not show this Indiana Gross Income Tax.

The Court: Well, are you denying that there were 188 twenty-two?

Mr. McNally: I don't know.

The Court: And that there was an absence on all of them after this meeting of any reference to Indiana Gross Income Tax?

Mr. McNally: I put in evidence copies yesterday which they checked. They started again towards the end of the job. They are in evidence as—

The Court: Well, if there is a dispute as to how many, and what they contain, I will have to sustain the objection.

Mr. McNally: I want to shorten it. These were checked by you yesterday, you gave them to the Northern Indiana man, and they pick up these billings again, including the Indiana Gross Income Tax.

Now, I am perfectly willing to agree between the last billing on November—the November 30th billing, until they started billing again, I think it was for two years later, towards the end, that there were no bills with the Indiana Gross Income Tax stated on them. Now, if that is all 189 you want, I agree to that. If there is any dispute by you, through this testimony, that that isn't the fact,

then I want the original bills, and not his summary of them.

Mr. Friedrich: Well, the original bills are here, and I can prove by him—if we are going to get into that phase of the law, let's settle it now.

Mr. McNally: It isn't a matter of law. Maybe I didn't make myself clear.

Mr. Friedrich: Yes, it is. It is a matter of proof.

Mr. McNally: Well, here are the bills that were introduced in evidence yesterday, in addition to the several that ended November 30, 1948, and they were picked up again, and they were received in evidence, and you checked them.

Mr. Friedrich: Yes.

Mr. McNally: The Court told you to check them.

Mr. Friedrich: We checked them, and—

The Court: Now, wait a minute.

The exhibits which you hold in your hand, what-
190 ever their numbers are, are those the total invoices that were sent by Herlihy to the defendant having to do with the contracts involved in this action?

Mr. McNally: Yes, your Honor, plus Exhibits 12 to 14.

The Court: Those are all of the invoices that are involved in this action?

Mr. McNally: These are not all of the invoices. These are all of the invoices on which the Indiana Gross Income Tax item appears, on Herlihy's billing to Northern Indiana. And I am perfectly willing to stipulate that on the other invoices running in the period between November 30th until they started sending them again that there is no Indiana Gross Income Tax item on the billing.

The Court: But you don't want to say how many?

Mr. McNally: I don't know how many.

The Court: Well, he said twenty-two. Well, then, what is the dispute?

Mr. McNally: There isn't any. I don't think Mr. Friedrich understands me.

191 The Court: Why are you objecting?

Mr. McNally: Because his question indicates that there were no further billings after this November 30th billing—

The Court: You can ask him on cross-examination, if his testimony is that, confront him with the other bills that you say did contain this billing after a lapse.

Objection overruled.

Read the question.

(Question read.)

A. There was one, as a subcontractor of Herlihy's billed the tax in the amount of $11.70, and the Herlihy Company gave us a credit memorandum offsetting that tax.

By Mr. Friedrich:

Q. When was that?

A. It was in the bill of September 30, 1949.

Mr. McNally: May we have that one pulled out?

Mr. Friedrich: Yes. Any ones that you want pulled out, we will pull them out.

By Mr. Friedrich:

Q. Now let's go to Contract 851. You have up

192 there the analyses you made of these various billings?

A. Yes, sir, I do.

Q. Now, go to Contract K-851. When was the first invoice there, the date of it, that the plaintiff sent to the defendant?

A. August 5, 1949.

Q. Did that contain a statement of the Indiana Gross Income Tax?

A. Yes, sir.

Q. What was done with reference to that invoice that did contain the tax?

A. That tax was stricken through by Herlihy's own people at Michigan City.

Mr. McNally: I object to this, and move that it be stricken. Was this witness there?

Mr. Friedrich: Well, let's find out.

By Mr. Friedrich:

Q. State, within your knowledge, what was done.

A. The invoice coming through had the tax stricken through and initialed by JKC, who I believe yesterday was established as Herlihy's field man at Michigan City.

Mr. McNally: I don't recall that. I move that
193 your observation be stricken.

The Court: Overruled.

By Mr. Friedrich:

Q. To your knowledge, was it stricken by someone in the employ of Herlihy Company?

A. Yes, sir.

Q. And on the invoice, did it have the initials JKC?

A. Yes, sir.

Q. Do you know whether or not there was a JKC in the employ of the Herlihy Company at that time?

A. Yes. It was established yesterday by Mr. Smith who he was.

Mr. McNally: I object to the deduction of the witness. In fairness, I will say there was a Cooper. I don't know what his initials were.

The Witness: Yes, J. K. Cooper.

The Court: Overruled.

The Witness: I beg your pardon, if I put it wrong.

(An instrument was marked Defendant's Exhibit 6, for identification.)

Mr. Friedrich: This is a photostatic copy, but we
194 have the original here, which can be pulled.

Mr. McNally: Is this the one in regard to Cooper?

Mr. Friedrich: Yes. There are the initials there, JKC.

By Mr. Friedrich:

Q. I hand you now what has been identified as Defendant's Exhibit No. 6, and ask you to look at it, it being a photostatic copy of an invoice.

Is that a photostatic copy of the original invoice?

A. Yes, sir.

Q. And down there you see a line, and the intials JKC, and a line through "Indiana Gross Income Tax 1½% 30.81," J. K. C., Do you see that?

A. Yes, sir.

Q. Is that what you meant when you testified before?

A. Yes, sir.

Mr. Friedrich: Well, we will offer in evidence Defendant's Exhibit 6.

Mr. McNally: I would like to reserve the admission of that, for this purpose: Who struck the line through Indiana Gross Income Tax, apparently that was an 195 okay in accordance with the understanding not to bill it.

Mr. Friedrich: We never had any understanding like that. You have spoken about it. We never had one.

The Court: Well, I am going to overrule the objection. You can cross-examine him on it. Admitted.

(And thereupon DEFENDANT'S EXHIBIT 6 was admitted in evidence.)

By Mr. Friedrich:

Q. Now, then, after this invoice of August 5, 1949, with reference to Contract K-851, how many invoices did Herlihy Company send to the defendant?

A. Seventeen.

The Court: On this particular contract?

The Witness: Yes, sir.

By Mr. Friedrich:

Q. As to the invoices sent after August 5, 1949, was there any statement or billing for Indiana Gross Income tax in connection with them?

A. No, sir.

Q. Now, will you go to Contract K-825. When was the first billing made or invoice sent under Contract

196 K-825?

A. March 31, 1949.

Q. How many bills or invoices were sent under Contract K-825?

A. According to my record, forty-two.

Q. And when was the last? You have given the date of the first, March 31, 1949; when was the last?

A. April 17, 1952.

Q. Now, in those invoices that were sent, how many, if any, had statements about the Indiana Gross Income Tax?

A. None of them.

Q. Now, go to Extra Order No. 1 under Contract 825. When was the first invoice received, as sent from the plaintiff to the defendant, under that extra order?

A. July 22, 1949.

Q. How many invoices were sent under that extra order?

A. Thirty-six.

Q. When was the last invoice sent?

A. February 14, 1952.

Q. And how often were these invoices sent by Herlihy to the defendant?

A. On a monthly basis.

197 Q. Now, with reference to the Indiana Gross Income Tax, did any of these invoices carry the Indiana Gross Income Tax?

A. No, sir.

(Instruments were marked Defendant's Exhibits 7 to 10, both inclusive.)

Q. I hand you four papers which are identified as Defendant's Exhibits 7, 8, 9, and 10. Without stating their contents, tell us what they are.

A. They are the analysis of the billings of the Herlihy account to us on the contracts in question.

Q. Were they prepared by you?

A. They were.

Q. Were they prepared by you after you made an examination of the actual invoices that are here in this box?

A. Yes, sir.

Q. And do they reflect the dates when the invoices showed the Indiana Gross Income Tax?

A. Yes, sir.

Q. Under the various contracts?

A. Yes, sir.

Mr. Friedrich: We offer Exhibits 7 to 10, both inclusive, in evidence.

198 Mr. McNally: I object to the exhibits going in evidence. The only summary can be as to computation. There is now a severe conflict up to this moment as to this billing. If the Court does not feel that my objection is sound, I wish he would reserve his ruling until I cross-examine.

The Court: Well, I am going to admit them, but it is subject, of course, to scrutiny and cross-examination to point out any errors that may exist in them. So with that opportunity that you will have, I will overrule the objection and admit them.

(And thereupon DEFENDANT'S EXHIBITS 7 to 10, both inclusive, were admitted in evidence.)

By Mr. Friedrich:

Q. Now, Mr. Hartman, is it a fact that you in your department not only had the Herlihy contracts but the other contracts that related to the Generating Station at Michigan City?

A. That's right, sir.

Q. There were contracts here produced by the gentleman from Sargent & Lundy where there was read
199 into the record certain tax provisions in those contracts. You were here yesterday?

A. Yes, sir.

Q. Now, as to those contracts, those that were here, and those that were not here, all of them, you had to work on and pass through you, as the Herlihy Mid-Continent contracts; right?

A. Right.

Q. Now, how many contracts were there for either construction work or equipment on the Michigan City job?

A. Between forty and forty-five.

Q. The contracts that were here, the eight that were here, outside of the contracts sued on, those were all part of the job?

A. That is right.

Q. It was testified to that all of those contracts were for equipment, except one. One was the Wellman contract, that had some construction work in connection with it?

A. Yes, sir.

Q. Is that correct?

A. To my knowledge, that is correct, yes.

Q. Now, under all of the contracts for the work
200 over there at Michigan City, with reference to the Indiana Gross Income Tax, did the company pay the Indiana Gross Income Tax?

Mr. McNally: I object to that.

The Court: Read the question.

(Question read.)

The Court: Well, I think, in view of the plaintiff's putting in eight, once that avenue of inquiry is opened, it would be inconsistent to say you can only inquire about eight and not inquire about all that are involved.

Mr. McNally: The purpose of that testimony yesterday, your Honor, was to show that it was excepted on the very contract in pen and ink and by typewriting, that the company was not going to pay the tax, but no such, as the testimony showed, no such exception was made on the Herlihy contracts, and no such notification was given to the Herlihy Company. That was the only purpose of that testimony, to show that Sargent & Lundy excluded payment to the contractor or the seller of the Indiana Gross Income Tax, but did not do it as to the Herlihy 201 contracts.

The Court: Well, if that was the limited purpose for showing it, then what value is this evidence, to show that the defendant didn't pay it in any of these contracts? The fact that they didn't pay it in all of them, but may have contracted to pay it in this one, wouldn't necessarily rule out their contract to pay it in this one, or failing to provide that it should not be paid in this one.

Mr. Friedrich: Well, the purpose of the evidence is this—it can't all be asked in one question—but here were eight contracts; the language in those contracts was entirely different from the language in the contracts sued on here.

Mr. McNally: They are in evidence.

Mr. Friedrich: Yes. I just want to make my statement to the Court. The Court can examine the documents. I stand on the statement that not one of the eight had the tax language that the contracts sued on here do. Now,

in those eight, it is true, there is no tax payable.
202 There is language, and I expect to show, that the language is not the same in all of the contracts. I want to come to the Babcock & Wilcox contract, on which we did pay the tax, and I want to show the language in the Babcock & Wilcox contract, and then I want to show how many of these other contracts in these forty-five, where the language was the same as it is in these contracts that are sued on, and show whether or not we paid the tax.

Mr. McNally: Well, you didn't pay Herlihy, either.

Mr. Friedrich: You can't do all of that in one—

Mr. McNally: The fact you didn't pay it, and may have been obligated to pay it in these other contracts that you say are similar certainly has nothing to do with the determination of this case.

Mr. Friedrich: How can you say that after the evidence you put in yesterday?

The Court: Wait a minute. I am ready to rule on
203 this, but I do want to find out one thing preliminarily, and that is, did Sargent & Lundy negotiate or recommend and assist in the preparation of these other contracts similar to the ones in suit?

Mr. Friedrich: Yes; as I understand it, they did the same in all of the others as they did in these contracts.

The Court: Well, is this then a preliminary question to the examination of these others as to the exact contract provisions?

Mr. Friedrich: Yes.

The Court: Well, with that understanding, I am going to overrule the objection.

Mr. Friedrich: Now answer the question.

The Court: Read the question.

(Question read.)

A. To my knowledge, on only one.

By Mr. Friedrich:

Q. And what one was that?

A. Babcock & Wilcox, on the erection of boilers.

Q. Do you know what the provisions taxwise, concerning the Indiana Gross Income Tax, were in the Babcock & Wilcox contract?

A. Well, I can't quote it.

204 Mr. McNally: I object to that, as being immaterial.

Mr. Friedrich: Well, I will read it, like you did yesterday, when I find it here.

By Mr. Friedrich:

Q. Well, just look at this contract here, this is the Babcock & Wilcox contract, is it not?

A. Yes, sir.

Q. And this is the one that you testified to, that you paid the tax on it, the Indiana Gross Income Tax?

A. That is right, sir.

Q. Now, let me do what counsel did yesterday.

Will you read the provisions into the record of this Babcock & Wilcox contract with reference to the taxes?

Mr. McNally: Same objection.

Are these provisions which were drawn by Sargent & Lundy?

Mr. Friedrich: Well, the contract was prepared—no, this one was prepared by Babcock & Wilcox themselves.

The Witness: This is their proposal.

Mr. Friedrich: It is the proposal on printed form of Babcock & Wilcox themselves.

205 Mr. McNally: It is part of the Sargent & Lundy contract?

The Court: Did Sargent & Lundy have anything to do with it?

I am asking you, Mr. Hartman.

The Witness: Only in making it part of the general contract.

The Court: They passed on it before it became a part of the general contract?

The Witness: They accepted it.

The Court: Well, I don't understand your objection. If you put in eight, it seems to me, under similar circumstances, the rest of them—I don't know why we should stop at eight.

Mr. McNally: Only this, Judge, as I said before, the only purpose was to show that Sargent & Lundy, acting for this defendant, made specific exceptions, letting the bidders know that they were not going to get the Indiana Gross Income Tax, but they didn't with Herlihy.

The Court: You say that is what it proves.

Mr. Friedrich: You didn't prove that.

206 The Court: Now, wait a minute. I am not saying that you are right or wrong at this point. What I am saying is, you say that is the conclusion that should be drawn, by virtue of the eight, when those eight are looked at with respect to the ones under inquiry, why stop at eight? If the other forty-five may throw light on that same question, with the same parties involved, same relationship, then it seems to me there is no reason why the Court should only look at eight and not maybe the forty-five.

Mr. McNally: Well, I know the Court is conscious of the fact how this will increase the record. There was no change on the Babcock & Wilcox language; it was not drawn by Sargent & Lundy; it does not go to Sargent & Lundy's intention and the intention of the defendant, whom they represented.

The Court: I am going to permit you to go into the relationship of this contract, as to what, if anything, Sargent & Lundy had to do with this contract as distinguished from the eight that you put in and the ones that are in-

volved. You will be given an opportunity to show if
207 there is any different fact situation that has a bearing on whether this contract should be looked at differently from the other eight and the ones that are involved. I am going to give you that opportunity, if you want to take it, when your cross-examination time comes, to bring out any differences.

Objection overruled.

A. "The prices provided for herein are exclusive of any present or future federal, state, municipal, or other sales or use tax with respect to the materials or equipment or services covered hereby and of any other present or future excise tax upon or measured by the gross receipts from this transaction, or any allocated portion thereof, or by the gross value of the material or equipment covered hereby. If the company is required by applicable law or regulation to pay or collect any such tax or taxes on account of this transaction or the material or equipment or services covered hereby, then such amount of tax shall be paid by the purchaser in addition to the price herein provided for."

Q. Now, that was a provision of the Babcock &
208 Wilcox contract?

A. That is right.

Q. Then I understand you paid the tax under those provisions, and this is the only contract where you did pay the tax; right?

A. That is right.

Q. Now, this contract, was this a construction or equipment contract?

A. That was a construction contract.

Q. Now, in the contracts in suit here, there is a separate provision or paragraph called 15(h), concerning taxes. Do you have that in mind?

A. Fairly well.

Q. How many contracts on this job at Michigan City had that identical language in them, if you know?

A. I can't answer that question.

Q. Did any of them have identical language?

A. I think there were several that would come very close to it.

Q. Did the Pope contract have that language?

A. I believe the Pope contract and the Schulman contract would probably be as close as I think I could say they were about the same.

Q. Was the Indiana Gross Income Tax paid by 309 Northern Indiana under those two contracts?

A. No, sir.

Mr. McNally: I object to that question, and move that the answer be stricken. That doesn't decide the issue in this case. They didn't pay Herlihy on it, either. The statute of limitations is still open.

The Court: I will overrule the objection. It goes to the weight.

By Mr. Friedrich:

Q. Do you know that the Schulman contracts were contracts identified as K-824 and K-855?

A. I believe those are the numbers. However, before I would want to say they are, I would want to check the contracts.

Mr. Friedrich: Well, all right; we will go ahead with something else, and when you get down you can check them.

The Court: Do you want to have him check them now? I can take a couple of minutes out.

Mr. Friedrich: Okay.

The Court: I thought we would go until about twelve thirty.

(A short recess was taken.)

By Mr. Friedrich:

Q. During the recess, did you check the contracts, or the other contracts, on this Michigan City plant?

A. I have.

Q. Now, how many contracts had language that related to taxes similar to the Herlihy contract, and I am referring to section 15(h).

Mr. McNally: I object to that. I haven't any objection if he says the identical language.

The Court: Well, I would assume—

Mr. Friedrich: I say identical language.

The Court: Well, all right, subject to cross-examination and production of them, so that you can check them, the objection is overruled.

A. Contract K-824 with the Schulman Company, that is, A. S. Schulman Electric Company, Contract K-855 with the A. S. Schulman Electric Company, Contract K-812, William A. Pope Company, have the same clause as K-814 and K-825.

By Mr. Friedrich:

Q. Now, as to the language of Contract K-851 211 which is sued on in this cause, have you examined the contracts to see how many have identical clauses with reference to taxes to K-851?

A. Yes, sir.

Q. Well, what is the number?

A. I believe there are three of them.

Mr. McNally: K-851, so there will be no confusion, is what we are suing on, as an Extra Order under K-851, not the contract itself. 851 was a different contract, a lump-sum contract.

Mr. Friedrich: That is true, but you—you are suing on an Extra Order, but the Extra Order refers back to the contract, and you made the statement in court, as I understood it.

The Court: Does the Extra Order have something different than the tax clause in 851?

Mr. McNally: Here is what we are suing on, on 851, "Cost plus basis, on which bidder will perform extra work on old steel authorized by purchaser"—that is Northern Indiana—"and not covered by the unit prices". The 212 unit prices are above. "This cost"—this, meaning cost plus—"to be based on the cost of labor, material, taxes, and insurance, plus a percentage, which percentage shall include general superintendent, office overhead, main office overhead, use of hand tools, and profit." So it was different. It had taxes generally, and did have a provision relating back generally to the other terms of the contract 851, which was a lump-sum.

The Court: Well I am going to overrule it. You can argue that there is a difference between your Extra Order contract and the main contract, that there is a material difference because of the language in the Extra Order terms.

Mr. Friedrich: It will show that the Extra Order, as far as that is concerned, related right back to the language of 851, and the language of 851 is different than the language of 814 and 825.

Mr. McNally: Of course it is, because 851 was a lump-sum contract.

Mr. Friedrich: I know that.

Mr. McNally: The others are cost plus.

The Court: I have ruled.

213 Mr. Friedrich: Answer the question.

The Witness: What is the question?

(The record was read, as follows:)

"Q. Now, as to the language of Contract K-851 which is sued on in this cause, have you examined the contracts to see how many have identical clauses with reference to taxes to K-851?"

"A. Yes, sir.

"Q. Well, what is the number?

"A. I believe there are three of them."

The Court: There isn't any question.

Mr. Friedrich: No, he has answered the question.

The Court: Next question, then.

By Mr. Friedrich:

Q. What contracts were they, and who were they with?

A. Contract K-822, Gage Structural Steel Company, Contract K-859, Western Architectural Iron Company, and Contract K-872, Sprinkman Sons Corporation.

Q. Were those construction or equipment contracts?

A. These are construction contracts.

Q. The three contracts that were like 814 or 825, the Schulman and Pope Company, were those contracts 214 construction or equipment?

A. Those are construction contracts.

Q. Now, Mr. Hartman, there was evidence here under exhibits yesterday that Herlihy Company sent some further invoices with reference to the Indiana Gross Income Tax. They have been identified here as Plaintiff's Exhibits 15-A to V. I will leave them there and you may examine them.

Did you receive those quarterly invoices from Herlihy, as shown in those exhibits?

A. Yes, sir.

Mr. McNally: They are not quarterly billings.

Mr. Friedrich: Well, all right; strike that out.

By Mr Friedrich:

Q. Did you receive those, as identified by Plaintiff's Exhibits 15-A to 15-V?

A. Yes, sir.

Q. Those billings are for tax alone, are they not?

A. I believe that's right.

(The witness made a statement that was inaudible.)

Mr. McNally: I can't hear you.

215 A. (continuing) I say the Herlihy Company submitted one summary of all of these billings headed Indiana Gross Income Tax, and it included other billings, other than Indiana Gross Income Tax. I don't find it here.

Q. Take a look and tell us, if these aren't all here, what ones are not here. I am going to ask you about those.

A. Under date of March 1, 1952, Herlihy Mid Continent presented a statement of Indiana Gross Income Tax due under Clause 15(h) of contract. In that invoice or statement they have a charge, additional fee on Contract K-825, $2586.40, which is not an item of Indiana Gross Income Tax, which they state that the statement covers.

Q. Well, that statement that you have there is the final statement, is it, the complete statement?

A. Summarizing the income tax bills that I have got.

Q. And is that a summary of the bills that lie on the desk here identified as Plaintiff's Exhibits 15-A to 15-V?

A. Well, it should be. It is a summary of what I have got here, and the ones I have got here checked with
216 those when I checked them yesterday.

Q. I hand you a statement which has been identified here as Defendant's Exhibit 11.

(Said instrument was marked Defendant's Exhibit 11, for identification.)

Q. (continuing) and ask you to look at it, and state whether or not that is an invoice that was sent through by the plaintiff to you, which is the summary that you have spoken about and testified about.

A. It is.

Mr. Friedrich: I offer in evidence Defendant's Exhibit 11.

Mr. McNally: I haven't any objection to it.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 11 was admitted in evidence.)

By Mr. Friedrich:

Q. Were these received by you, the statements which are identified as Plaintiff's Exhibits 152-A to V, about at the time of the date that the statements bear?

A. Approximately, that's right. They were sent through Michigan City, the same as all other billings were,
217 and then these were forwarded to us. Here is one that I just pulled that was dated by Herlihy Mid-Continent Company November 30th. It cleared through our Michigan City office and I got it at Gary on December 7th, so I would say that approximately that's right.

Q. Well, a very short time after the date that each one of these statements bears you would receive it at your office at Gary?

A. That's right, sir.

Q. Then what was done with those invoices, those that are identified as Plaintiff's Exhibits 15-A to V, inclusive?

A. They were just filed.

Q. Were they ever paid?

A. No, sir.

Q. Now, Mr. Hartman, when this work first started, did the plaintiff qualify under the Indiana Gross Income Tax as against withholding?

Mr. McNally: I object to that. It is a legal question.

The Court: I would assume that it is.

Read the question.

(Question read.)

218 Mr. Friedrich: Well, under the Indiana Gross Income Tax Act, we would be required to withhold from Herlihy moneys unless he qualified under the Act, and he qualified under the Act. We will have no argument about it.

Mr. McNally: He is required to qualify under the Act, isn't he?

Mr. Friedrich: No; he qualifies if he doesn't want us to withdraw the money and send it to Indianapolis. He didn't. He wanted it all to go to Chicago, and he made his own arrangements with the Indiana Gross Income Tax Division.

Mr. McNally: Isn't that the same thing that Babcock & Wilcox did?

Mr. Friedrich: Well, all of them didn't follow the same pattern.

Mr. McNally: Of course, the Act doesn't require—to do this job, he had to qualify in Indiana.

The Court: Now, wait; it is difficult for the reporter when you are both talking at the same time.

219 (An instrument was marked Defendant's Exhibit 12, for identification.)

By Mr. Friedrich:

Q. I hand you here a document identified as Defendant's Exhibit 12, together with an attachment thereto, being a certificate of the Secretary of State of Indiana, showing authority to do business in Indiana, and also the affidavit of F. J. Herlihy, and ask you to look at it, and tell us, did you receive that in connection with any of the contracts for work done by the plaintiff?

A. Sir, I had nothing to do with this.

Q. Who did?

A. The accounting department. I believe it was handled through Mr. Pizan's office.

Q. You know nothing about it?

A. I know that it existed, but I had nothing to do with getting it.

Q. Are you familiar with Mr. Herlihy's signature?

A. Fairly well.

Mr. McNally: I am; I am very familiar with it. I am

perfectly willing to state that it definitely looks like it; I would say it is. We will agree that was prepared
220 by the Northern Indiana Public Service Company's lawyer, Mr. Anderson.

Mr. Friedrich: The affidavit was prepared by Mr. Anderson, sent in to Mr. Herlihy, and executed there.

Mr. McNally: I will admit the signature.

Mr. Friedrich: We now offer in evidence Defendant's Exhibit 12.

Mr. McNally: I object to it. I don't see any materiality.

The Court: Well, I can't determine that specifically at the present time, unless you want to argue it at length.

Mr. McNally: No.

The Court: So I'll overrule the objection, and admit it.

(And thereupon DEFENDANT'S EXHIBIT 12 was admitted in evidence.)

By Mr. Friedrich:

Q. Now, under these contracts, was a final payment made or settlement made, retained percentages paid, to Herlihy?

Mr. McNally: I object to that, because it includes the word "settlement".

221 The Court: I will sustain, on that basis; that is a conclusion.

Mr. Friedrich: Will you answer that?

The Court: Well, no, I sustained the objection, because it included the word "settlement", which might have some legal significance.

By Mr. Friedrich:

Q. When was the last payment made to Herlihy under Contract K-814, if you know?

A. I can only answer as to the date that the request

for final settlement of that, or for the release of the retainers was made to our treasury department.

Q. When was that?

Mr. McNally: I move that the settlement part of the answer be stricken.

Mr. Friedrich: I didn't think I used the word "settlement".

The Witness: I think I did.

Mr. McNally: There is no contention that we were paid anything on our claim for Indiana Gross Income Tax. We agree to that.

A. On May 11, 1950.

222 By Mr. Friedrich:

Q. At that time were all retained percentages under that contract paid to Herlihy?

A. All retained percentages were released by this letter, yes.

Q. Do you know whether or not thereafter they were then paid?

A. They were paid by the treasury department, yes.

Q. Now, in connection with that, at the time that was done, did you receive any further documents from the plaintiff company?

A. I have a document, waiver of lien, submitted by the Herlihy Mid-Continent Company, signed by F. J. Herlihy, marked "Final".

Mr. McNally: I object to that question, and move that the answer be stricken and all testimony of similar purport, because there is no allegation in this answer that they are claiming we released this claim for Indiana Gross Income Tax. A release, of course, must be specifically pleaded.

The Court: Well, what about that phase, is payment or release an affirmative defense?

Mr. Friedrich: I didn't think so.

223 Mr. McNally: I think that is one point that I am right about.

Mr. Anderson: We aren't pleading payment. We are claiming no liability.

Mr. Friedrich: We are claiming no liability. We claim we don't owe them anything, not that we paid them.

Mr. McNally: Obviously, to me, anyway, the purport of this testimony is that Herlihy, by accepting final payment, released his claim, final payment on other billings, released his claim as to Indiana Gross Income Tax, which is not pleaded in your answer, and is directly contrary to the letter which was received in evidence at the close of the plaintiff's case, Plaintiff's Exhibit 16.

Mr. Friedrich: Our theory of the case is simply this, and it will develop, all we are attempting to do now is put in the evidence. What we think the evidence shows, you will hear later on.

Mr. McNally: Do you think it shows a release of this claim that is the subject matter of this suit?

224 Mr. Friedrich: I don't know. Here is a document that Herlihy sent out in connection with getting his retained percentage.

The Court: I am ready to rule.

The objection is overruled.

(An instrument was marked Defendant's Exhibit 13 for identification.)

By Mr. Friedrich:

Q. I now hand you here a photostat which has been identified as Defendant's Exhibit 13, and ask you to look at it and to state whether or not that is a true and correct copy of the release of mechanic's lien?

A. It is.

Q. That was sent to you?

A. Yes, sir.

Q. And that you hold there?

A. Yes, sir.

Q. Who prepared this, if you know?

A. Herlihy Mid-Continent Company.

Mr. Friedrich: We offer in evidence Defendant's Exhibit 13.

Mr. McNally: I object to it, in addition to the 225 grounds that I have previously stated, on the further ground that in the case that Mr. Friedrich so greatly relies upon, namely, the Schnarr case, in the Indiana Supreme Court, they said, in effect, the Indiana Gross Income Tax, in any event, under any circumstances, can't be a lien upon property, so the giving of the waiver of mechanic's lien for material and labor would not have any effect upon the claim.

The Court: I suppose that it a matter for argument. I will overrule the objection, and let it in.

(And thereupon DEFENDANT'S EXHIBIT 13 was admitted in evidence.)

By Mr. Friedrich:

Q. Referring back to Defendant's Exhibit 7, 8, 9, and 10, you have testified that they were made and prepared by you from the original records. As far as you know, are they true, complete, and accurate?

A. As far as I know, they are, yes, sir.

Mr. Friedrich: Well, I think that is all with this witness, your Honor.

The Court: All right; we will adjourn until two o'clock.

226 And at two o'clock in the afternoon of said day, Tuesday, February 21, 1956, the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

ARTHUR J. HARTMAN, a witness on behalf of the defendant, having heretofore been duly sworn, testified as follows:

Mr. Friedrich: I have just a few more questions that have come up.

Direct Examination (Resumed) by Mr. Friedrich.

Q. Mr. Hartman, you were on the stand when we recessed?

A. That is right.

Q. I now hand you what is identified as Defendant's Exhibit 11, and ask you to look at it. And on the bottom of the exhibit I see an item under date of November 30, 1950, "Additional fee on Contract K-825 $2586.40." Did that item have anything to do with the Indiana Gross Income Tax?

A. No, sir.

Q. I also call your attention to the same exhibit,
227 under Contract K-825, and I notice that there is an item under date of April 26, 1951, $4429.70; under Extra Order #1 there is another item under date of February 26, 1951, $58.07; and then "Extra Billing on Contract K-851," on April 26, 1951, $10.33.

Do you see those items?

A. Yes, sir.

Q Now, in the plaintiff's exhibits that were introduced

yesterday, 15 A to V, this would be 15-A, a photostatic copy of the invoice, it shows in typewriting April 26, 1951, and then in writing, March 31, 1951. And then on 15-B, the letters 3-31-1951, or the numbers 3-31-1951, after crossing out April 26, 1951.

Now, you notice that?

A. Yes, sir.

Q. Are these bills in these amounts, or invoices in these amounts, the ones that are in their summary under date of April 26, '51?

A. They are.

Q. Did you change the dates on them?

A. No, sir. I have the originals here.

Q. You have the originals. Is there any mark like that on those?

228 A. No, sir.

The Court: May I see those?

(Said instruments were handed to the Court.)

The Court: Go ahead.

By Mr. Friedrich:

Q. Now, Defendant's Exhibit No. 11, which is the summary from the plaintiff on the Indiana Gross Income Tax, dated March 1, 1952, did you have a conversation with Mr. Herlihy, the president of the plaintiff corporation, on or about that date with reference to this invoice?

Mr. McNally: What's the date, now?

Mr. Friedrich: March 1, 1952.

A. I would say approximately in the neighborhood of March 15th. I did not receive these bills until March 12th.

Q. 1952?

A. 1952.

Q. After you received that summary statement, did you have a talk with Mr. Herlihy?

A. Yes, sir.

Q. By telephone?

A. Yes, sir.

Q. What was the substance, report that conversa-
229 tion that passed between you and Mr. Herlihy.

Mr. McNally: I object to it, on the ground that the conversation is incompetent because of Mr. Herlihy's death.

The Court: Objection overruled.

A. The conversation with Mr. Herlihy was about the amount shown on this statement of $2586.40, which was an invoice that we had been holding that was dated November 30, 1950. It covered a fee on a building that was erected at the station, a steel building. The Herlihy Company was to put it up, but due to getting started we bought the building and erected it. The fee charged is in accordance with the contract, but the Herlihy Company did not do any work on it. We disputed the bill, for adjustment, and on or about the 15th of March I had this discussion with Mr. Herlihy.

Q. Was there any discussion at that time about the bill with reference to the Indiana Gross Income Tax?

Mr. McNally: I object to that, as leading and suggestive, as well as on the further ground of the death of the deceased.

The Court: Overruled.

230 A. We adjusted the bill in question. Mr. Herlihy said, "Now, what are we going to do about the income tax?"

Q. Was this Mr. Herlihy, his conversation?

A. Yes, he asked, "What are we going to do about the income tax?"

Mr. McNally: May I interpose? I want to object to the "adjusted," unless it refers to this fee, rather than to anything about the Indiana Gross Income Tax.

The Witness: It does refer to the fee, only on this one invoice in dispute.

After we had that adjustment settled on that invoice, Mr. Herlihy said, "What are you going to do about the income tax?" I said, "Well, Mr. Herlihy, you agreed there would be no income tax." He said, "That's right, but something has come up, and I have changed my mind." That was the end of the discussion.

By Mr. Friedrich:

Q. That was on or about March 15, '52?

A. I would say approximately that time, yes.

231 Q. There is one thing more. Referring again to Defendant's Exhibit 11, which is the summary statement, with the dates under the various contracts, would you say that a separate invoice, that you have over here, was sent at approximately those dates, and that this summary statement carried those?

A. I would say so.

Mr. McNally: I didn't get that question.

The Court: Read the question.

(Question read.)

Mr. McNally: That doesn't make sense to me. What statements were sent that coincided with the summary, I thought the summary had to do with the statements or bills sent by Herlihy.

Mr. Friedrich: It does.

Mr. McNally: It may be my fault—

Mr. Friedrich: Nothing else. That's what it says.

Mr. McNally: —but I don't understand the question.

Mr. Friedrich: Possibly I am not happy enough in my use of language. But on this statement, which you

232 did not put in, there are various dates. They have only to do with the gross income tax.

Mr. McNally: Yes.

Mr. Friedrich: Now I am asking him, were separate invoices sent by Herlihy to Northern Indiana at approximately these dates covering these items.

Mr. McNally: That's all right.

Mr. Friedrich: Your answer was?

The Witness: Yes.

By Mr. Friedrich:

Q. There is one thing further: You testified to the date when the retained percentages were paid under Contract K-814. Will you tell us, if you can, when were the retained percentages paid to the plaintiff company under Contract 825?

A. I would like to question your question to me. I did not testify as to date of payment on K-814. I testified as to the date that we in the purchasing department released the retainers for payment.

Q. Well, all right. Then when did you release the percentages for payment in the purchasing department on Contract K-825?

A. I have got that here—

233 The Court: When you say "released it," you told the treasurer that he was to go ahead and send them a check?

The Witness: That is right.

The Court: So that's the way he did it.

A. (continuing) On K-825 there were at least three releases, partial releases of retainers, May 1, 1951, September 17, 1951, and April 7, 1952.

The Court: Those you released on what contract?

The Witness: K-825. The release of April 7th was the final release.

By Mr. Friedrich:

Q. Now go to Contract 851. When was the date that the purchasing department released the retained percentages under Contract K-851?

A. December 29, 1950.

Q. 1950?

A. That is right.

Q. Under your Extra Order No. 1?

A. We treated Extra Order No. 1 as part of Contract K-825.

Mr. Friedrich: There is one thing more, your Honor. Some of them are in, and some are not. This one is not in.

(An instrument was marked Defendant's Exhibit 14, for identification.)

By Mr. Friedrich:

Q. I hand you here a photostatic copy of an invoice from Herlihy, identified as Defendant's Exhibit No. 14, under date of September 30, 1948. Will you look at that, and testify whether that was received by Northern Indiana from Herlihy.

A. Yes, it was.

Mr. Friedrich: We offer this in evidence.

Mr. McNally: No objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 14 was admitted in evidence.)

Mr. Friedrich: Will you mark these as the next exhibits?

(Said instruments were marked Defendant's Exhibits 15 to 19, both inclusive.)

By Mr. Friedrich:

Q. Some of these may be duplications of some that they put in. I hand you now what has been identified as Defendant's Exhibit 15, and ask you to state what that is, without stating its contents.

A. That is the invoice that I referred to as being incorrect on the billing that was superseded on November 16, 1948.

Q. I notice that this is a photostatic copy.

A. That is right.

Q. Is this a true copy of the original?

A. That is right.

Q. I hand you what has been identified as Defendant's Exhibit No. 16. Without stating its contents, I will ask you to state what it is.

A. That is the corrected bill submitted by Herlihy.

The Court: A little louder.

The Witness: I say that was the corrected invoice submitted by Herlihy.

By Mr. Friedrich:

Q. Now I show you what has been identified as Defendant's Exhibit 17, and ask you to look at that, and to state what it is.

A. That is the billing of November 30, 1948, on Contract K-814.

Q. I now ask you to examine what has been identified as Defendant's Exhibit No. 18. State what that is.

A. That is the billing under date of December 31, 1948, on Contract K-814.

236 Q. I now hand you what has been identified as Defendant's Exhibit No. 19, and ask you what that is.

A. That's an invoice dated September 6, 1949, a second billing on Contract K-851.

Mr. Friedrich: I think I gave you copies of all these.

We now offer in evidence Defendant's Exhibits 15, 16, 17, 18, and 19.

Mr. McNally: They are duplications, but I have no objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS 15 to 19, both inclusive, were admitted in evidence.)

Mr. Friedrich: That is all.

Cross-Examination by Mr. McNally.

Q. Mr. Hartman, the first billing which you received from Herlihy Mid-Continent Company on any of the jobs, and beginning with the first one, 814, was on September 30, is that correct, or on or about that date?

A. That is correct.

237 Q. On the October 30th bill, which has been identified as Plaintiff's Exhibit 12, and you also put a duplicate in, Herlihy Mid-Continent billed the defendant for the Indiana Gross Income Tax for September and October, 1948; that is correct, isn't it?

A. That is correct. May I point out one thing, that the error—they added this $770 as a retainer, and this is the invoice that was sent back for correction.

Q. I understand that.

A. And then the November 16th corrected it.

Q. That had nothing to do with the Indiana Gross Income Tax question?

A. The invoice was sent back. It didn't come to my office.

Q. Then on November 16, 1948, under that date, Herlihy Mid-Continent Company sent to the defendant another bill, a corrected bill, and that bill also billed the defendant for Indiana Gross Income Tax, did it not?

A. It billed, that's right.

Q. Then on November 30, 1948, you received the next bill, on or about that date, and that bill had as one of the items of billing the Indiana Gross Income Tax;
238 isn't that correct?

A. That is correct.

Q. Now, thereafter, all of the bills of Herlihy Mid-Continent Company that were sent to you, which have been identified as Plaintiff's Exhibits 15-A to 15-V, those were

billings for Indiana Gross Income Tax alone on all of the contracts; isn't that correct?

A. Yes.

Q. When you said, during the fore part of your direct examination, that there were no billings after this November 30th billing; you meant that there were no billings of Indiana Gross Income Tax included in the billings for labor, material, and so on; isn't that correct?

A. In the regular billings.

Q. In the regular billings?

A. That's right.

Q. But you did get bills, that is, the defendant got bills, according to the dates that have already been put in evidence, for the Indiana Gross Income Tax on separate billings for Indiana Gross Income Tax alone, except for that one bill that had something to do about a fee charged, which you said you adjusted with Herlihy?

239 A. That is right.

Q. That is all correct, you understood the question?

A. Yes.

Q. Who struck out on these October 30th, November 16th, and November 30th billings, which included the Indiana Gross Income Tax, the item for such Indiana Gross Income Tax, was it you or Mr. Lindeman?

A. Let me state, I don't think it was struck out on the 16th, because that was sent back for a corrected invoice.

Q. Well, leave the 16th out, then.

A. I took them off at the direction—after Mr. Herlihy told me to.

Q. And that was subsequent—now we are getting into this conversation.

Mr. McNally: I want to state, for the record, I don't think it is necessary, when I cross examine the witness

about the conversations with Mr. Herlihy I am not waiving my objection to the testimony of the conversations.

The Witness: You left some bills here, Mr. McNally.

240 Mr. McNally: Thank you.

By Mr. McNally:

Q. You testified that on all of the billings from Herlihy Mid-Continent Company under these contracts, all of the billings, I am talking about, the bills would be sent by Herlihy Mid-Continent Company, the plaintiff, to Michigan City, to Northern Indiana Public Service Company there, and there they would be checked for material and labor, and from there they would be sent down to Sargent & Lundy, Sargent & Lundy would certify them, and then send them to the defendant at Hammond, Indiana, and that would be the first time that you would see the bills; is that correct?

A. That is correct. I would like to get one thing straight for you, when you talk about Hammond, we were at Hammond part of the time, and part of the time at Gary.

Q. Well, either to Hammond or Gary?

A. I would rather refer to Gary, because we were there, the purchasing office, those years.

Q. All right. The route would be to the defendant at Michigan City, from Herlihy Mid-Continent to the defendant at Michigan City; then the Michigan City

241 office of the defendant would send them to Sargent & Lundy; then Sargent & Lundy, when they certified them, would send them to the defendant at Gary, at that time, and later at Hammond; correct?

A. That is correct.

Q. Consequently, Mr. Hartman, when you struck out, on those October 30th and November 30th billings, the item of Indiana Gross Income Tax, Sargent & Lundy had already certified those bills for payment; isn't that true?

A. I can't agree with your October invoice.

Q. Well, can you agree with me as to the November 30th invoice?

A. November 16th and 30th.

Q. Is that true as to those?

A. I would say yes.

Q. You spoke about two contracts being identical with the contracts with Herlihy, namely, the Pope Company contract and the two contracts of the Schulman Company; is that correct?

A. That is right.

Q. And you testified, under Mr. Friedrich's questioning, that the Indiana Gross Income Tax was not paid by the defendant on those contracts?

242 A. That is right.

The Court: Is it Polk or Pope?

The Witness: Pope, P-o-p-e.

By Mr. McNally:

Q. Now, the fact of the matter is that both the Schulman Company and the Pope Company have made claims against Northern Indiana Public Service Company for payment of the Indiana Gross Income Tax, have they not?

A. I wouldn't want to say they made claims, no.

Q. Did you know that the attorney for the Schulman Company was in court when the motion to dismiss was argued in this case?

A. No, I didn't.

Q. Weren't you in court at that time?

A. No, sir.

Q. Well, do you mean to tell me now that you have no knowledge whatever that both the Pope Company and the Schulman Company have made claims for reimbursement of the Indiana Gross Income Tax which they paid under their contracts?

Mr. Friedrich: We will object, your Honor. It is not proper cross examination, and it is cross examination on an immaterial point.

243 Mr. McNally: Why, you put it in, to show that nobody else asked for it. Now, I am going to show that the claims are still open.

Mr. Friedrich: Now, Mr. McNally, I have let you go a long time here, but my proof was that we did not pay any tax under the Schulman or Pope contracts. That has nothing to do with what some lawyer thinks, or that a man who is in court—

Mr. McNally: What's the purpose or relevancy of it?

The Court: I am inclined to hear it all, whatever it is. Overruled.

Mr. McNally: Will you answer the question?

A. The only thing that we got from Schulman or Pope, I believe I would be right if I would say, was quarterly statements of a tax that they had paid, which they probably expected that Northern Indiana would be willing to accept, and we didn't accept it.

By Mr. McNally:

Q. Didn't an officer of the Pope Company come to the defendant's offices about the payment of it after the work was done?

244 A. Not to my knowledge.

Q. Did a lawyer for Schulman ever write to the defendant for payment under the Schulman contracts?

A. Not to my knowledge.

Q. Who would know about that, Mr. Anderson?

A. I should know it; I should have got it

Q. You say that you would have gotten any communications or any knowledge that Pope and the Schulman Company were pressing claims, but all you know about it is that they billed you quarterly for the Indiana Gross Income Tax on their contracts; is that your answer?

A. With one exception.

Q. What is the exception?

A. Mr. Schulman wanted to negotiate a settlement, and I refused to negotiate.

Q. Was that in a conference?

A. That was just one day when he came out to the office.

Q. Was Mr. Charles Schwartz, or Mr. Schwartz, with him?

A. Mr. Harry Schulman alone.

Q. Alone. Did you ever hear of a lawyer named Schwartz, who represents Schulman?

245 A. No, sir, not to my knowledge.

Q. As a result of that conversation, did Mr. Schulman tell you that he was dropping the claim?

A. No, he didn't ask whether we would drop it, or not. He wanted to know if I would negotiate a settlement.

Q. And you declined?

A. I declined even to discuss it.

Q. He didn't tell you to strike it off, that he wouldn't press it, did he?

A. He didn't furtner discuss it, no.

Q. You know nothing about the Pope Company claim at all?

A. To my knowledge, Pope has never pressed us.

Q. Do you know a man named Flanagan, an officer with the Pope Company?

A. No, sir, I don't.

Q. As these bills from Herlihy Mid-Continent Company, identified as Plaintiff's Exhibits 15-A to 15-V, continued to come in over various dates, which have been identified on the documents, and I won't go through them, you said all you did, on your direct examination, was to file them; is that correct?

A. That is correct.

246 Q. You had no communication with Herlihy Mid-Continent Company, the plaintiff, after you got them, did you?

A. Not until the one I told you about, about March 15th.

Q. That was after you got on the stand again this afternoon?

A. That is right.

Q. When you got these statements, about twenty of them, from time to time, were you conscious of this conversation you testified you had with Herlihy, Senior, on December 20, 1948?

A. I believe what Mr. Herlihy said—

Q. Were you conscious of that conversation when you received these bills, were you conscious that you had such a conversation.

A. Yes.

Q. Did you file these bills that the defendant received; Plaintiff's Exhibits 15-A to 15-V, from Herlihy in your accounts payable file?

A. We don't have an accounts payable in the purchasing department.

Q. Well, did you file them where you file any other bills?

247 A. I filed them in the Herlihy contract file.

Q. Would that be the place you filed any other bills from Herlihy?

A. We didn't file any other bills except the original copies.

Q. That's what I mean.

A. Yes.

Q. They would go in the file, too?

A. That's right, the copy we retained.

Q. Do you recall the date of April 29, 1952, in connec-

tion with this Indiana Gross Income Tax claim of Herlihy Mid-Continent Company?

A. If you are referring to a letter that was sent to Mr. Lindeman, I know about it.

Q. Were you in Mr. Lindeman's office when I talked to him by telephone on that date?

A. I was not.

Q. Did you see the letter that Mr. Herlihy wrote to Northern Indiana Public Service Company after my telephone conversation?

A. Well, I don't know just what date you are referring to as the telephone conversation.

Q. Well, the telephone conversation, as the unreplied letter states, was April 29, 1952. Now I am asking 248 you if you saw that letter after that date.

A. I saw this letter, yes.

Q. Did you talk to Mr. Lindeman about the letter?

A. Yes.

Q. How soon after you got the letter, or after the letter was received by Mr. Lindeman?

A. Oh, probably the same day.

Q. You did not call, you did not call Mr. Herlihy or you did not call me, nor did Mr. Lindeman call Mr. Herlihy or call me, isn't that a fact?

A. If you are asking me whether I did, the answer is no.

Q. Do you know whether Mr. Lindeman did?

A. Not to my knowledge.

Q. Did you tell Mr. Lindeman, when he showed you this letter, Plaintiff's Exhibit 16, that you had had a conversation with Mr. Herlihy the previous month, March 15, 1952?

A. Upon receipt of this letter?

Q. Yes.

A. No.

Q. You did not discuss that with him at all?

A. No.

Q. Did you discuss with Mr. Lindeman at the time he showed you this letter this conversation that you
249 testified to among you, Lindeman and Herlihy on December 20, 1948?

A. Not at that time, no.

Q. You knew Mr. Herlihy, F. J. Herlihy, the former president of this company—

A. Very well.

Q —before these contracts were let?

A. That's right.

Q. He had done work for Northern Indiana Public Service years before?

A. '29, '30, and '31.

Q. Will you describe Mr. Herlihy to the Court, physically, was he a very large man?

A. Yes, he was a man of large stature.

Q. Broad shoulders?

A. Fairly well, yes.

Q. Big head?

A. Yes.

Q. Booming voice?

A. At times.

Q. A very aggressive character, wasn't he?

A. In my estimation, yes.

Q. Very positive in his views, wasn't he?

A. Well, he knew what he was talking about, I will grant you that.

250 Q. When he was talking, he was very positive in the way he said what he did; isn't that correct?

A. Well, that would all depend upon the question that was asked.

Q. But generally?

A. Generally, he knew what he was talking about.

Q. After you got these bills, after you got the Novem-

ber 30th bill, some time after that, around the middle of December, I think you said, you called Herlihy on the telephone?

A. That was about March 15th.

Q. No, I am talking about the first one, now, back in '48.

A. We talked to him December 28th, 1948.

Q. You said on direct, I believe—

A. We had the meeting on the 28th. I talked to him approximately about the 20th, making the arrangements for the meeting.

Q. I beg your pardon. Now, when I referred in previous questions to this conversation as being the 20th, I meant the 28th, December 28th, the date that you say you had the conversation with him. You understand that?

A. That was the date of the meeting at Gary.

251 Q. Yes. In previous questions that I put to you this afternoon, I incorrectly stated the date of that meeting as December 20th. Now I want to correct that to December 28th, but that would not affect what you testified to on my cross examination, would it?

A. I believe on December 20th, about there, is when I called to make the appointment.

Q. I understand that, but I don't want to go over again the questions I previously put to you this afternoon, and all I ask is this, prefacing it with the statement that I incorrectly gave the date of such conversation in my questioning as December 20th; I was mistaken; you say the conversation was December 28th; if in those previous questions I had used December 28th rather than December 20th, your answers would have been the same, would they not?

A. That is right.

Q. What did you say to Mr. Herlihy when you called him on the telephone on December 20, 1948? I want you to give me the exact conversation, as best you can. Where

it is not exact, tell me it is your recollection, or the substance, as best you recall.

A. I will give you my recollection, let's put it that
252 way. I called him and told him we had a question on these billings as to the Indiana Gross Income Tax, and that we would like to have him come to our office for a discussion.

Q. What did he say?

A. And that was agreed.

Q. What did he say?

A. He said, okay, he would come out, but due to the holiday season coming up he suggested that we wait until after Christmas, and that is why we set the date of December 28th.

Q. Is that the whole of the conversation on the telephone?

A. To my knowledge, yes; as I recollect it, yes.

Q. Well, is it the substance of the whole conversation?

A. Yes.

Q. You testified on direct that when he got out there that there were just the usual pleasantries?

A. That's right.

Q. And then Lindeman said to Herlihy, "We are ready to discuss the Indiana Gross Income Tax," and that you then took over.

Is that the substance of what you said?

253 A. That is right.

Q. And then right after that was said, you said, "This tax is a tax upon you as a penalty for doing business in Indiana."

Is that what you said?

A. Substantially, I believe that is it, yes.

Q. And you further testified that Herlihy said, "I know that. Strike it out from the bills. We will not bill you for it."

A. That is correct. might state this, Mr. Herlihy said, "I know what the Indiana Gross Income Tax is".

Q. Then did he continue, "Strike it out from the bills. We will not bill you for it."?

A. That is right.

Q. You then stated, on your direct examination, that Herlihy sat there for a few minutes, and said he had to go to Michigan City, and left; is that correct?

A. Yes. We talked about different things, after the tax question closed.

Q. What did you talk about?

A. Oh, probably the weather; I wouldn't know offhand just what we talked about, but it wasn't the tax ques-
254 tion. We might have talked about the progress of the job at Michigan City.

Q. But you don't know what you talked about?

A. I think it would go back to the progress of the job at Michigan City, and he said then he was going to Michigan City.

Q. Are you sure you talked about the progress of the job at Michigan City, or are you just thinking of that now?

A. Well, I think we talked, to start with, about—

Q. That isn't what I asked you. You are not testifying, you are not sure you talked about it, is that correct?

The Court: What is your best recollection?

The Witness: That there was mention of it, let's put it that way.

By Mr. McNally:

Q. Was that before or after the conversation about the Indiana Gross Income Tax?

A. I would say after.

Q. Therefore, in view of your testimony as to this conversation, Herlihy never gave you any argument at all or any opposition to eliminating this Indiana Gross
255 Income Tax billing, did he?

A. None whatsoever.

Q. He just came out to your office, you told him it was a penalty for doing business in Indiana, and he said, 'Strike it from the bills. We will not bill you for it"?

A. He said he knew what the Indiana Gross Income Tax was.

Q. All right; he said he knew what the Indiana Gross Income Tax was, and further, "Strike it from the bills. We will not bill you for it."

A. That is correct.

Q. No argument why you should pay it, was there?

A. None whatsoever.

Q. No reference by him to the provision in the contract that all federal, state, and local taxes would be billed as costs and paid by Northern Indiana, nothing about that?

A. He didn't bring anything up like that, no.

Q. He just apparently made the trip all of the way out to Gary, Indiana, to see you, to tell you, "I'll strike it out," and he didn't tell you that on the telephone; is that correct?

A. That is correct.

256 Q. When did you first tell anyone that you had had such a conversation with Mr. Herlihy after December 28, 1948?

A. By writing a letter to Lawyer and Anderson, attention of Mr. Anderson.

Q. After that?

A. After the meeting, yes, we wrote a letter to Mr. Anderson.

Q. Yes, I know that; that's in evidence.

After that, when was the first time you told anybody of this conversation?

A. I don't recall telling it particularly to anybody.

Q. To anyone at all before you took the stand this morning; is that correct?

A. Oh, we have talked about it, yes, in our summarizing up of our papers here. I talked to Mr. Anderson about it, because he had the original letter.

Q. When did you first talk to Mr. Anderson about it?

A. Well, I think probably Mr. Anderson called me the day after he got the letter. I wouldn't swear to it; I don't remember.

257 Q. Did Mr. Anderson call you the day after he got the letter?

A. I think probably he did.

Q. Did he want an explanation of what you meant in the letter by omitting the Indiana Gross Income Tax from the billings, as you stated in the letter?

A. I don't remember, no.

Q. Did he want to know what was going to be the final disposition of the Indiana Gross Income Tax question?

A. I don't think that ever was a question that came to any of our attention.

Q. What?

A. I don't think that was a question that came to any of our attention, what would be the final disposition. We figured we had it cleaned up.

Mr. McNally: I move that that part of the answer be stricken. I did ask you about your conversation with Anderson. That is all of the answer I wanted.

The Witness: I don't remember the conversation, to what extent it was.

By Mr. McNally:

Q. But, in other words, he wanted some explana-
258 tion of the letter; is that correct?

A. I don't think so.

Q. Did he call you merely to tell you that he had received the letter?

A. Well, we had a conference on the 17th with Mr. Anderson.

Q. 17th of what?

A. Of December. If you had read the letter, you would have seen that was in reply to a meeting of December 17th in his office.

Q. What has that got to do with what he said when he called you, after your meeting with Herlihy on December 28th, that is what I am talking about, your conversation with him then, and why he called you.

A. I think probably he called me to find out the same thing you are, if Mr. Herlihy said anything more than what I testified here.

Q. I suggest to you, Mr. Hartman, that Mr. Herlihy in substance told you that until the end of the job he would bill you for the Indiana Gross Income Tax separately, and that the matter—this is proper cross-examination—that the matter then would be settled.

259 A. No; no such statement.

Q. Nothing at all of that kind said?

A. Nothing whatsoever, no.

Q. Will you tell this Court then, why, when you got the billings, Plaintiff's Exhibits 15-A to 15-V, and the letter of April 29, 1952, Plaintiff's Exhibit 16, you did not reply to Herlihy Mid-Continent Company?

A. Why should I reply? There was no letter written.

Q. That's all; you have answered.

I started, and then didn't pursue, who else did you tell you had such a conversation with, other than Mr. Anderson?

A. I don't recall of anybody.

Q. Nobody at all; is that correct?

A. To my recollection, I wouldn't want to go out and say I talked to somebody; I couldn't realize who it would be.

Q. Who did you talk to this noontime about taking the stand again this afternoon on your direct examination?

A. In particular, we had lunch together, the attorneys, Mr. Lindeman, Mr. Thacker, and I.

260 Q. Did you tell either one of them at lunch today that you had had this conversation with Mr. Herlihy on the telephone on March 15, 1952?

A. I talked to Mr. Friedrich about it as we were walking back from lunch.

Q. You told Mr. Friedrich for the first time, did you, when you were walking back from lunch this noon that you had this conversation with Herlihy on March 15, 1952?

A. Do I understand right, you asked me whether it was today?

Q. What?

A. You asked whether it was today that I talked to anybody, and I said Mr. Friedrich, on the way back from lunch.

Q. That's the first time you ever told Mr. Friedrich about it?

A. No. You didn't ask that before.

Q. When did you previously tell Mr. Friedrich about that conversation of March 15, 1952?

A. At the time the suit was started, or the papers were served, whatever you call it. I don't know the legal terminology for it.

Q. Summons was served?

261 A. After summons was served, yes.

Q. And you told Mr. Friedrich about this conversation of March 15, 1952?

A. Yes.

Q. Did you ever write up a summary of what you knew about this case at the time the case was filed or any time thereafter?

A. The only summary I made is right here, on the billings.

Q. You never wrote any summary of your knowledge of the case?

A. No.

Q. Did you ever tell Mr. Anderson about this conversation of March 15, 1952?

A. I did.

Q. When did you tell him about it?

A. Oh, approximately—maybe it was about the same time, after the summons was served.

Q. When did you talk to Mr. Friedrich, if you did, about your testimony that began this morning?

A. You mean today, what we talked about?

Q. No, your testimony. Didn't you see Mr. Friedrich in his office, or in Mr. Anderson's office?

A. I met with Mr. Friedrich and Mr. Anderson
262 both several times, yes.

Q. During what week?

A. During the time of the summons, until the court.

Q. Well, when the case started Monday, yesterday, did you see them last week about your testimony?

A. Yes, we had a meeting last week.

Q. One, or more?

A. One, I believe.

Q. Was there any discussion at that meeting as to this March 15, 1952, conversation?

A. It was brought out, yes.

Q. Who brought it up?

A. Probably myself.

Q. And did they make a note about it?

A. I am sure they did.

Q. Now, in that March 15, 1952, conversation, you said you called Herlihy about the incorrect billing on the fee on Defendant's Exhibit 11, and that you adjusted that with him, and then Herlihy said to you, "What are you going to do about the Indiana Gross Income Tax?"

Right?

A. That is right.

263 Q. And that you said, "Why, you agreed to drop it," is that it?

A. Not to bill it, that is right.

Q. Not to bill it?

A. Not to bill it, or drop it, maybe I used the words "drop it" this morning.

Q. Well, what did you say to Herlihy on March 15, '52?

A. Well, the intent was that he was not going to bill it.

Q. No; I said, what did you say to him?

A. He asked me what we were going to do about the Indiana Gross Income Tax. I believe I said, "Mr. Herlihy, you agreed to drop that."

Q. And what did he say?

A. "Something has come up and I have changed my mind."

Q. What did you say to that?

A. I did not say anything.

Q. You hung up or ended the conversation?

A. Well, very shortly after that. We didn't discuss any Indiana Gross Income Tax, I will tell you.

Q. Did you discuss the fact that he had been bill-
264 ing you right along for the Indiana Gross Income Tax?

A. No, sir.

Q. And when he said that he had changed his mind, you didn't ask him why or any reason for changing his mind?

A. He didn't offer it, and I didn't see any reason why I should ask him.

Q. Did you convey that conversation to Mr. Lindeman?

A. I did.

Q. When did you do that?

A. The same day.

Q. Therefore Mr. Lindeman knew of that conversation that you said took place between you and Herlihy on March

15, 1952, when he received this letter from Herlihy Mid-Continent Company, Plaintiff's Exhibit 16, and showed it to you; is that correct?

A. That is right.

Mr. McNally: That's all.

265 *Redirect Examination by Mr. Friedrich.*

Q. Mr. Hartman, about this conversation on or about March 15, 1952, with Mr. Herlihy, you discussed that with me in my office, didn't you?

A. Yes.

Q. And I made notes of it?

A. That is right.

Q. And sometime after 1952, as we discussed this case I read my notes to you?

A. That's right.

Q. And I read this to you, if you remember, yes or no, "On or about March 15th"—

Mr. McNally: I object.

Mr. Friedrich: Now, wait a minute; you have been impugning everybody—

Mr. McNally: I am not impugning you.

Mr. Friedrich: It is proper to clear this up,

The Court: Well, I'll overrule the objection.

By Mr. Friedrich:

Q. "On or about March 15, 1952, I had a further talk with Herlihy, the president of the company, concern-
266 ing the payment of the gross income tax. Hartman asked him about the various invoices that had been sent through billing only for the tax, and Herlihy said, 'Something has come up and I have now changed my mind'."

Do you remember me reading those notes to you in our conferences?

A. In substance I do, yes.

Q. Now, just a few things. What was your understanding when Mr. Herlihy said, "Well, I won't bill you for it," or "Strike it off; I won't bill you for it"; did you understand by that that no claim was to be made for this tax?

Mr. McNally: I object to that.

The Court: I think I'll have to sustain as to his subjective understandings.

By Mr. Friedrich:

Q. Now, it has been testified to here and you have been asked about these invoices going up to Sargent & Lundy, the engineers, in Chicago, and Mr. McMeen testified here yesterday for the plaintiff.

When those invoices went up to Sargent & Lundy, what was the purpose of them going there?

Mr. McNally: I object to that, his conclusion as to
267 the purpose. He has already stated the fact, what happened.

The Court: Well, what they did, the purpose is implicit, isn't it, in their action?

Mr. Friedrich: Well, I don't know.

By Mr. Friedrich:

Q. Let me ask you this: Were Sargent & Lundy ever instructed to pass on this question of the Indiana Gross Income Tax by the defendant?

Mr. McNally: I object to that.

The Court: Well, overruled.

A. No.

By Mr. Friedrich:

Q. Well, did they pass on these Indiana Gross Income Tax billings?

Mr. McNally: I object to that.

The Court: Overruled.

Did you get any information, any advice from them, that is the question. This isn't a new question; it is just a clarification of it.

A. Are you referring now, Mr. Friedrich, to the invoices as they cleared Sargent & Lundy?

By Mr. Friedrich:

268 Q. Yes.

A. They were a verification as to material and as to work incorporated in the job. If there had been a question of tax, they did not take that into consideration.

Q. That is what I wanted to know.

Mr. McNally: I object to that, and move that the answer be stricken.

The Court: Overruled.

Mr. McNally: It gives this witness a right to say, contrary to fact in the record, what Sargent & Lundy were passing on.

The Court: McMeen didn't say that they passed on the tax, did he?

Mr. McNally: He said they certified the bills, and this man said today that they certified the bills.

Mr. Anderson: He said they certified all but the tax.

Mr. Friedrich: I want this witness to corroborate the very testimony that they introduced as part of their case in chief under McMeen. He said they had nothing to do with the tax, and Hartman said the same thing.

269 Mr. McNally: This witness testified that the bills—he eliminated one—were certified for payment by Sargent & Lundy.

The Court: When you got them back from Sargent & Lundy, if they were okayed or certified, what kind of certification was there, how was it done, through a stamp, a telephone conversation—

The Witness: May I show it to you?

The Court: —or a letter, a memo, or what?

The Witness: May I show it to you?

It is a certificate.

The Court: A certificate?

The Witness: Yes.

The Court: Well, I would assume that the certificate would indicate what they certified to. It would be the best evidence.

I will sustain the objection.

Mr. Friedrich: It's already in evidence under McMeen, but I wanted him to corroborate it. They proved it.

(There was an off the record conference between counsel and the witness about invoices.)

The Court: Do you want some time?

Mr. Friedrich: I would have to have a few minutes. I have never seen one of these before, your Honor.

The Court: We will take a little time out.

(A short recess was taken.)

By Mr. Friedrich:

Q. Let me get at it this way, Mr. Hartman:

The invoices that plaintiff sent through for the Indiana Gross Income Tax, which are set forth in this summary, Defendant's Exhibit 11, and Plaintiff's Exhibits 15-A to 15-V, were those ever sent through to Sargent & Lundy, the engineers?

A. No; Sargent & Lundy have never seen them.

Q. It is a fact that only bills that had labor and material and equipment under the contract would be sent in to Sargent & Lundy?

Mr. McNally: I object to that.

The Court: Sustained.

Mr. Friedrich: That is all.

271 *Recross Examination by Mr. McNally.*

Q. While the bills for the Indiana Gross Income Tax alone, identified as Plaintiff's Exhibits 15-A to 15-V inclusive, were not sent by Northern Indiana Public Service Company to Sargent & Lundy, the fact is, is it not, that

plaintiff's Exhibits 13 and 14, being the bills sent in 1948 when the contract work was begun, beginning with October 30, particularly October 30, November 16, and November 30, 1948, did go to Sargent & Lundy before you ever saw them, didn't they?

A. That is correct.

Q. And those bills had included thereon not only labor and material but this Indiana Gross Income Tax item; isn't that correct?

A. That is correct.

Q. And those bills came to you ultimately at Gary, certified by Sargent & Lundy; isn't that correct?

A. That is correct.

Q. There was some mention before this past adjournment about a stamp. Northern Indiana Public Service
272 Company had a stamp with regard to Indiana Gross Income Tax, didn't it?

A. A stamp?

Q. Yes.

A. Not to my knowledge. I don't recall any stamp that was ever used.

Q. Do you remember any stamp on contracts to make certain that the contractor was to pay the Indiana Gross Income Tax, which stamp in substance said that the Indiana Gross Income Tax was to be excluded from what the contractor was to get?

A. Not from the purchasing standpoint, no; we never used such a stamp, no.

Q. In the purchasing department?

A. Yes.

Q. You wouldn't say that there wasn't such a stamp either in Sargent & Lundy's office or in the Northern Indiana Public Service Company's office, would you?

A. No, I wouldn't say that; I don't know.

Mr. Friedrich: Will you read the last question and answer?

(Question and answer read.)

Mr. McNally: A stamp containing the language in
273 substance the same as was written in pen and ink on the eight contracts.

Mr. Friedrich: Excepting the gross income tax?

Mr. McNally: Excepting the gross income tax, making an exclusion of that from the taxes which Northern Indiana was to pay.

Mr. Friedrich: He says there wasn't any such stamp?

Mr. McNally: He says there wasn't any in the purchasing department.

Mr. Friedrich: Just one more question:

Redirect Examination by Mr. Friedrich.

Q. Have you calculated the time, the months, number of months, from the time that you had your meeting in Gary with Mr. Herlihy, until they started billing for the tax, the lapse in months between those two dates?

A. Well, it was December 28, 1948, and the first tax bills or statements that we got were November 30, 1950, according to my recollection; approximately twenty-three months.

Q. Twenty-three months?

274 A. Yes.

Mr. Friedrich: That is all.

Mr. McNally: I have one more. It is not really following what he asked him, but I did forget it.

Recross Examination by Mr. McNally.

Q. Were you surprised during this conversation with Herlihy, Senior, on March 15, 1952, when he asked you, "What are you going to do about the Gross Income Tax?"

A. Was I surprised?

Q. Yes.

A. I was.

Q. Were you surprised when he said, "Yes, but something came up; I changed my mind"?

A. I was surprised that Mr. Herlihy—

Q. Were you surprised, that's all I asked.

A. Yes.

Q. You were conscious of the fact, when you had that conversation, were you not, that just the month before, on March 7, 1952, you had gotten this summary, admitted in evidence as Defendant's Exhibit 11, for all of these 275 Indiana Gross Income Taxes; isn't that correct?

A. I believe you will find—

Q. I asked you, were you conscious of the fact—

A. I didn't get it until March 12th.

Q. Well, let's take March 12th. When you had this conversation with Herlihy on March 15, 1952, you say you were surprised at the position that he took about the Indiana Gross Income Tax. Were you conscious of the fact that on March 12, 1952, you had seen the summary that Herlihy had sent under date of March 7, 1952?

A. I was surprised, yes.

Q. Despite that?

A. Despite everything, yes.

Q. You were also surprised, despite the fact that previous to March 7, 1952, and going back to the beginning of 1950, Herlihy Mid-Continent Company was sending bills for the Indiana Gross Income Tax, over twenty in number; you were still surprised despite that fact, also; is that correct, or not?

A. Well, I took them as a statement; I—

Q. Were you surprised?

A. Well, I don't know whether I was surprised, 276 or not. I don't know why you should ask if I was.

Redirect Examination by Mr. Friedrich.

Q. You said you were surprised. Why were you surprised?

Mr. McNally: Well, I object to that.

The Court: Overruled.

A. I had had many dealings with Mr. Herlihy; I found him to be very straight, and knowing what he was talking about, and after he once said that he would delete the tax or strike it off, and not bill us, I couldn't understand why he had changed his mind because something came up, which he didn't clarify what he meant. That surprised me.

Mr. Friedrich: That's all.

Recross Examination by Mr. McNally.

Q. In other words, in every other dealings that you had, or the Northern Indiana had that you had anything to do with, I take it from your last answer that Mr. Herlihy was honest and direct; is that correct?

277 A. That's the way I had him figured, yes.

Mr. McNally: That is all.

(And thereupon the witness was excused.)

ARTHUR F. LINDEMAN, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. State your name.

A. Arthur F. Lindeman.

Q. Where do you live, Mr. Lindeman?

A. R. R. No. 1, Box 246, Michigan City, Indiana.

Q. And what is your business or occupation?

A. Purchasing agent, Northern Indiana Public Service Company.

Q. How long have you been employed by the defendant company?

A. Forty-four years.

Q. And how long have you been purchasing agent?

A. About twenty-seven years.

Q. You were then the purchasing agent during the years that the work was done on the Herlihy contracts which are sued on in this action?

278 A. That is right.

Q. Just tell, briefly, what your office had to do with these contracts.

A. You want to start out from the specifications on?

Q. Just tell us.

A. Well, the specifications, plans and specifications, were drawn by Sargent & Lundy. They were then submitted to Northern Indiana, and we checked them over and approved them, and they were then, of course, sent back to Sargent & Lundy, who then sent them out for bids; and after the bids all came in, why, Sargent & Lundy summarized these bids; and then we all sat around a table and decided on the contractor; and after that was done, why, Sargent & Lundy drew up the contracts, and then submitted them to us for our approval.

Q. Now, going to these contracts here that are involved in this case, did you attend a meeting in Gary on or about December 28th at which there was discussion with Mr. Herlihy on the question of the Indiana Gross Income Tax?

A. Yes, I did.

Q. Was that meeting in your office in Gary?

279 A. In my office, yes, sir.

Q. Well, what prompted that meeting?

A. Why, we received some bills from Mr. Herlihy regarding the Indiana Gross Income Tax, and those bills of

course were handled by Mr. Hartman. Mr. Hartman called Mr. Herlihy regarding this Indiana Gross Income Tax and mentioned that we would like to have a meeting, and Mr. Herlihy said, yes, he would come out, and a date for the meeting was set I think for December 28th.

Q. The bills that you speak about are the bills that are in evidence and have been identified as November 30th, November 16th, and October 30, 1948?

A. That's right.

Q. Those are the bills which prompted this meeting?

A. That's right.

Q. Who was present at this meeting?

A. Mr. Herlihy, Mr. Hartman, and myself.

Q. Now, will you relate, in your own words, and in the language used by the parties, the conversation that occurred at this meeting?

A. Well, Mr. Herlihy came in sometime around, oh, eleven o'clock, because he wanted to get down to 280 Michigan City at noon to see the job over there, and I said, "All right, Mr. Herlihy, we would like to open up the discussion on the Indiana Gross Income Tax with reference to these contracts at Michigan City"; and he said, "All right," and then we started talking about it.

First, we passed the time of day, for about a few minutes, and then later on we got into the meat of the discussion.

Q. What did Mr. Herlihy say, if anything?

A. Well, we talked for a while about the contracts, and he said, "Well, I know all about the Indiana Gross Income Tax," and as far as he was concerned he was going to eliminate the billing on future invoices.

Mr. McNally: Unless this is the statement—

The Court: How did he say it, if you remember, or in substance?

The Witness: Well, he said, "I know all about the

Indiana Gross Income Tax, and in the future we will eliminate the billing on the Indiana Gross Income Tax on these Michigan City contracts."

281 By Mr. Friedrich:

Q. When he said that, what did you understand about eliminating the billing?

Mr. McNally: I object to that, as calling for the impression or conclusion of the witness.

The Court: Sustained.

Mr. Friedrich: Defendant offers to prove by the witness that the witness will testify that it was his understanding that the matter of the Indiana Gross Income Tax would be eliminated and would not be billed to Northern Indiana for payment at any time.

Mr. McNally: I move that the offer be rejected.

The Court: It is.

By Mr. Friedrich:

Q. I hand you here a letter which is identified as Defendant's Exhibit 5, and ask you to look at it. Did you write that letter, or sign it, Mr. Lindeman?

A. This letter was dictated by Mr. Hartman, and signed by me.

282 Q. And then forwarded?

A. And forwarded to Mr. R. S. Anderson, Lawyer and Anderson.

Q. Lawyer and Anderson were at that time the general counsel of the defendant company?

A. They were.

Q. Now, these invoices that are here in evidence, testified to by Mr. Hartman, they came through your department, purchasing department?

A. Yes, they came through the purchasing department in the regular routine set-up.

Q. Now, after receiving the letter here at about the

time of the date of the letter of April 29, 1952, sent to your attention by Herlihy Mid-Continent Company, at about that time did you have a phone conversation?

A. Well, I had a phone conversation with Mr. McNally.

Q. Was that before or after this letter?

A. The previous day, either the same day or the previous day.

Q. Now, I will ask you to examine that paragraph and read it.

A. "Mr. McNally"—

283 Q. Now, I want you to read it, and then I am going to ask you some questions about it.

Did you have a talk with Mr. McNally?

A. Yes.

Q. What did you say to Mr. McNally, and what did he say to you, report the conversation, the actual conversation, as near as you can.

Mr. McNally: Is this to dispute what is stated in the letter?

Mr. Friedrich: I don't know.

Mr. McNally: I think the rule is that he is estopped from questioning the letter, where it is admitted in evidence, and agreed that there was no reply. In other words, a party cannot later at the trial say that the letter passing between the parties didn't truthfully and accurately state what transpired.

Mr. Friedrich: That isn't the purpose of it.

Mr. McNally: Of course, there was none received. It is agreed in this record that there was no reply.

The Court: Objection overruled.

284 Read the question.

(Question read.)

A. Mr. McNally called and said that Mr. Herlihy had received payment on retainers, on final retainers, and wanted to know, if Mr. Herlihy cashed that check, whether

that would have any bearing on this case, and I told him no. And then, of course, they cashed the checks.

Q. Well, did you at that time also tell Mr. McNally the position of the company?

A. Yes, the position—

Mr. McNally: I object to that, as leading and suggestive.

The Court: Well, it is a little bit leading.

Was there a further conversation?

The Witness: Yes. I mentioned that this wouldn't change our feeling about the Indiana Gross Income Tax.

Mr. McNally: I can't hear you.

The Witness: This didn't change our position on the Indiana Gross Income Tax.

Mr. McNally: Is he testifying now that he told me that?

285 The Court: Is that what you said to Mr. McNally?

Mr. McNally: That "it did not change our position"?

The Court: Your position, whose position?

The Witness: Our position.

Mr. Friedrich: The position of the Northern Indiana. That's why I asked it. That wasn't included in this letter.

By Mr. Friedrich:

Q. Do you know anything about the conversation that Mr. Hartman had with Mr. Herlihy on or about March 15, 1952?

A. The only thing, after Mr. Hartman had the conversation, he told me about it.

Q. It is a fact, isn't it, Mr. Lindeman, that you also wrote a letter, I think to the plaintiff company, in reference to the Indiana Gross Income Tax, in which certain court decisions were discussed?

A. Yes.

Mr. McNally: I object to that.

Mr. Friedrich: Was that letter to you, or to whom
286 was that letter directed? We ary trying to get a copy of the letter.

Do you have it there?

The Witness: The letter was written to Herlihy Mid-Continent Company.

Mr. McNally: There was no notice to produce on it.

Mr. Friedrich: No, there was no notice to produce. That is a copy of it. You have the original.

(Instruments were marked Defendant's Exhibits 20 and 21, for identification.)

Mr. McNally: I will be very happy to have both of these letters go in evidence, even though they are copies, very happy.

By Mr. Friedrich:

Q. I now hand you a copy of a letter identified as Defendant's Exhibit 20, and ask you if that is a copy of the letter that you sent to the plaintiff company on or about that date?

A. Yes.

Q. I also hand you some letters identified as Defendant's Exhibit 21, consisting of three pages, with the identification on the first page, and ask you to look at
287 them and state whether or not that is further correspondence between you and Herlihy, the plaintiff company?

A. Yes.

Mr. Friedrich: We offer them in evidence. I understand there is no objection to them.

Mr. McNally: No objection whatsoever.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS 20 and 21 were admitted in evidence.)

Mr. Friedrich: I think that is all, Mr. Lindeman.

Cross-Examination by Mr. McNally.

Q. Mr. Lindeman, you saw the bills that Herlihy Mid-Continent Company sent to the Northern Indiana Public Service Company, identified as Plaintiff's Exhibits 15-A to 15-V, which were for gross income tax over the period 1950 to 1952?

A. The invoices come to the mail girl, and then they go direct—in this case they went direct to Mr. Hartman.

288 Q. Did you see them?

A. After they came to my approval, then I saw them.

Q. You did not communicate with Mr. Herlihy when you got any of these bills for Indiana Gross Income Tax?

A. No, I didn't.

Q. You did not call him on the telephone, did you?

A. No.

Q. When the first of those bills came in, did you have any conversation with Mr. Hartman about them?

A. Yes.

Q. What was said between you and Mr. Hartman?

A. Well, we felt like we always felt.

Q. What was the conversation?

A. The conversation was that we would not pay them.

Q. That was all?

A. Yes.

Q. That was as to the first bill. Did you have conversations thereafter about them, or did you pay no attention to them, after the subsequent ones came in, 15-B to

289 15-V. Those are the bills for the Indiana Gross Income Tax alone.

A. I saw some of these, not all of them. Of course, I saw the summary.

Q. When you saw the subsequent ones after the first one, did you talk to Mr. Hartman about those?

A. We have talked on and off.

Q. No; did you, or didn't you?

A. Yes, I did.

Q. What were the conversations as to subsequent bills as they kept coming in for Indiana Gross Income Tax alone, what was said by you, and what was said by Mr. Hartman?

A. I told Mr. Hartman these invoices are for Indiana Gross Income Tax and they are not to be paid.

Q. And that's all?

A. Yes.

Q. And that was in substance the same conversation that you had all during this period—that you may have had concerning these bills; is that correct?

A. That's correct.

Q. Did you have substantially the same conversation when you got the summary which is in evidence, the summary of all of the income tax claims of Herlihy?

290 A. That's right.

Q. You had the same conversation?

A. Same conversation.

Q. Mr. Lindeman, will you look at Plaintiff's Exhibit 16, which is a letter Herlihy Mid-Continent Company sent you on April 29, 1952, and will you read particularly the paragraph that pertains to my conversation with you?

A. Yes.

Q. Is there anything in that paragraph that is untrue?

A. I don't remember this, informing him.

Q. Informing me. I was the one who was talking to you.

A. I don't recall that.

Q. You don't recall what?

A. I don't recall that, informing you about the outcome of our—

Q. About the outcome of your meeting?

A. Yes.

Q. You may have said it, might you not have?

A. I don't recall it.

Q. You did say you were going to have a meeting?

291 A. Yes.

Q. And that's in the paragraph?

A. That's right.

Q. And that that meeting was to decide whether or not you were going to pay the Indiana Gross Income Tax, wasn't it?

A. Well, it was another conversation.

Q. Between whom?

A. Between Mr. E. D. Anderson and myself.

Q. The lawyer?

A. No; no, he is the fellow I report to.

Q. One of the officers?

A. That's right; one of the officers.

Q. And the conversation to decide whether or not you would pay Herlihy Mid-Continent Company these Indiana Gross Income Tax claims it was making—wasn't that the purpose of the meeting?

A. Well—

Q. Wasn't it, Mr. Lindeman?

A. Well, it was whether to pay it, or not.

Q. You did not tell me in that conversation, did you, Mr. Lindeman, that Herlihy had ever agreed to waive his claims or his company's claims for Indiana Gross Income Tax?

292 A. That Herlihy—what was that, again?

(Question read.)

A. Not in this—

Q. Conversation with me?

A. Not in the conversation with you.

Q. And you never told me, in this conversation you had with me on this same date, April 29, 1952, of a con-

versation that Hartman had with Herlihy on March 15, 1952, either, did you?

A. No.

Q. I think I asked you this: You didn't call Herlihy Mid-Continent Company after you got this letter?

A. No.

Q. Is it fair to say that you accepted what was stated in there to be our conversation?

A. No, I wouldn't say so.

Q. In what way would you qualify an affirmative answer to that question?

A. Well, I think along that line, that we took the same stand that we had always taken.

Q. I understand that, but does the letter, as far as it pertains to my conversation with you, fairly state the conversation?

293 A. Yes, I would say so.

Mr. Friedrich: I didn't read the letters when I offered them, your Honor.

Mr. McNally: The one I have been asking about is our exhibit, Plaintiff's Exhibit 16.

The Court: I am going to read it now.

Mr. Friedrich: It was an oversight not to read them, when I offered them.

The Court: I will read them.

Go ahead.

By Mr. McNally:

Q. Mr. Lindeman, I show you Defendant Northern Indiana Public Service Company's Exhibit 20, and ask you to state if that is not a copy of one of your letters to Herlihy Mid-Continent Company.

A. Yes, this is a copy.

Q. And the date of the letter of which that exhibit is a copy is April 21, 1952?

A. That is right.

Q. Is there anything stated in that letter that Herlihy had agreed to drop or strike out or give up his claim for Indiana Gross Income Tax?

294 Mr. Friedrich: Well, that isn't proper cross-examination. The letter speaks for itself.

The Court: I think I will sustain the objection.

Mr. McNally: I would like to ask the Court, if I may, to read these, too.

The Court: I think so.

Mr. Friedrich: I should have read them, your Honor, when I offered them.

The Court: That's all right; I will read them now.

Mr. McNally: No further cross.

Mr. Friedrich: That is all with Mr. Lindeman.

(And thereupon the witness was excused.)

Mr. Friedrich: Mr. Thacker, will you take the stand, please?

(Instruments were marked Defendant's Exhibits 22 to 28, both inclusive, for identification.)

FRED E. THACKER, a witness on behalf of the de-
295 fendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. What is your name?

A. Fred E. Thacker.

Q. Where do you live, Mr. Thacker?

A. I live in Munster, Indiana.

Q. What is your business or occupation?

A. I am the treasurer and secretary of Northern Indiana Public Service Company.

Q. How long have you been such officer?

A. I have been treasurer since 1934, and secretary since 1949.

Q. You were treasurer during the time involved in these contracts with Herlihy Mid-Continent?

A. Yes.

Q. And as such treasurer, I take it that you made the payments that were made to Herlihy under these contracts and extra orders sued on in this case, whatever payments were made by Northern Indiana were made by you, is that right, as treasurer?

A. I caused the checks to be issued, if I didn't sign all of them.

Q. They were all made by you or under your di-
296 rection in your office as treasurer of this company; is that right?

A. That's right.

Q. I hand you now a photostatic copy of a check identified as Defendant's Exhibit No. 22, bearing date of September 20, 1949, being payment under contract to Herlihy Mid-Continent of K-851, and ask you to examine it.

A. All right.

Q. And state, was that check sent and payment made to Herlihy, as evidenced by that check?

A. Yes, sir.

Q. And on the reverse, was that indorsement on the check?

A. That indorsement was on the check.

Mr. Friedrich: You have copies there. We offer this exhibit in evidence.

Mr. McNally: I object to it, for this reason: The pleadings show, without dispute, that Herlihy Mid-Continent was paid for all work, and if the purpose of these checks is to assert a release of the claim, then I want to point out to the Court that there is no such defense set
297 up in the answer. A defense of release must be affirmatively alleged and affirmatively proved. Now, if that's not the purpose, there is no necessity for putting

all these checks in evidence. I will agree that they were paid.

The Court: Well, if they agree they were paid everything but the gross income tax, what is the use of going through all these checks? What do you prove by them when you get through?

Mr. Friedrich: Well, we prove that they accepted these checks on various dates. It is not the idea of pleading or proving a release, consideration for a release; that's not it. It simply establishes a course of conduct on the part of the plaintiff company that in our opinion is inconsistent with the position they have now taken in court, and we have picked out these checks as showing the conduct of Herlihy Mid-Continent, the conduct that Herlihy followed.

The Court: If a person claims more than the other person is willing to pay, just by accepting what the undis-
298 puted amounts are, it does not necessarily show an agreement that that is all that is due, does it?

Mr. McNally: That is my position, exactly.

Mr. Friedrich: Well, all right, if that is your position exactly, this is the answer to it: Here is a suit under a contract for the amount of the Indiana Gross Income tax. We are asserting that under the terms of the contract there is no liability against us. It isn't a question of payment, that isn't it. We say, and it is a fact, that we have paid all of the amounts under the contracts except the Indiana Gross Income Tax, but if you make payments right along, and the other person accepts those payments at different times, it isn't proving a release, there is no consideration; it simply shows the course of conduct that is inconsistent with the position you now take in court, and that's the purpose of it.

The Court: Well, regardless of the position of either party, I don't know why you are objecting to putting
299 them in, if you have admitted that there was payment.

It seems to me that you could shorten this up very materially by just looking at these and agreeing that they be put in, rather than to have each of them identified by Mr. Thacker and a lot of time consumed in it.

Mr. McNally: I will do that.

The Court: Why don't you stipulate—

Mr. Anderson: You have copies.

The Court: —reserving your right or your position as to the authenticity of them.

Mr. McNally: I will do that.

The Court: Why don't you do it now?

Mr. Friedrich: We have the original checks here. When the Court says authenticity, I proved by him that they are exact copies of the checks that are in one of those—

The Court: Well, the objection is overruled, and these checks are admitted.

(And thereupon DEFENDANT'S EXHIBITS 22 to 28, both inclusive, were admitted in evidence.)

Mr. Friedrich: I think that will shorten Mr. Thacker's testimony.

300 Mr. McNally: Are these all of the checks?

Mr. Friedrich: Those are what we want to introduce. Those aren't all of the checks of the payment, because you sent through fifty or a hundred different bills.

The Court: What are these checks, why just these?

Mr. Friedrich: Just these?

The Court: Yes.

Mr. Friedrich: Because they refer to various dates, now. They refer to evidence of retained percentages under some of these contracts. And this first one that I have is the date of September 20, 1949, under Contract K-851. They relate back to the first invoice under Contract K-851 on this date, which included the tax, and by referring back to the invoice you will see that the tax was included. Then the check comes along and pays the invoice in full without the

tax. Then as to the others, there were no taxes claimed.

There are checks in here as to retained percentages
301 under Contract K-851. The Court will recall that they asked for retained percentages, and Mr. Hartman testified that was cleared out, and the waiver of lien was given, and all of that. Now, here are the checks on those retained percentages.

The Court: Well, if you want him to identify them—

Mr. McNally: I will stick to my stipulation. Let me ask you this, are there any indorsements on any of the other checks—

Mr. Friedrich: Sure, they are all indorsed.

Mr. McNally: No, I mean anything different than these. Is there any reason, other than what you have stated, for not putting in the other checks?

Mr. Friedrich: None that I know.

Mr. McNally: I will stipulate to the authenticity.

Mr. Friedrich: That is true, isn't it, Mr. Anderson?

Mr. Anderson: The only reservation on any indorsement is on the final retainer, where Herlihy reserved their
302 right by indorsement.

Mr. McNally: Here is one that is strange. Here is a check of January 6, 1948.

Mr. Anderson: We can explain that.

Mr. McNally: Long before any negotiations on the contracts.

The Witness: I can explain that.

Mr. Anderson: I am glad you caught that, Mr. McNally.

By Mr. Friedrich:

Q. I hand you here what has been identified as—

Mr. McNally: That was the copy you gave me.

Mr. Friedrich: Yes, and I am trying to find the original in here.

By Mr. Friedrich:

Q. (Continuing.) —identified as Defendant's Exhibit No. 23. The check bears the date of January 6, 1948.

A. That was a mechanical error. At the beginning of the year, the mechanical apparatus that put the date, the year, in on the machine wasn't changed, and this January 6 was typed in by the girl as part of the—

303 The Court: It should have been 1949?

The Witness: It should have been 1949.

The Court: Now, as I understand it, these are some of the checks that were issued by the Northern Indiana Public Service Company to Herlihy Company, Herlihy Mid-Continent, with relation to these contracts that are involved in this suit, but are not all of the checks that were issued by your company to the Herlihy Company.

The Witness: That's right, your Honor.

Mr. Friedrich: That's right. We have picked out certain checks, the payments on certain dates, because they tie in, when some of these records are closely examined, to various items that have been testified to here.

The Court: You selected certain ones that you wanted to put in?

Mr. Friedrich: We selected certain checks, in connection with our theory of the case. We know—

The Court: Well, I understand. You don't have to argue now.

304 Do you have any objection?

Mr. McNally: No.

The Court: Well, my ruling will stand.

Mr. Friedrich: That is all.

The Court: Just a minute. He has a right to cross examine you.

Mr. McNally: I just have one question.

Cross-Examination by Mr. McNally.

Q. The company would not pay these bills that Herlihy Mid-Continent Company started to send in, in 1948, with the Indiana Gross Income Tax on them, would the company?

A. No.

Q. In other words, the company refused to pay any item that had this Indiana Gross Income Tax charged on the bill; right?

A. That is true.

Q. And if Herlihy Mid-Continent Company wanted to get paid for labor and material and what it was doing, everything other than the Indiana Gross Income Tax, 305 the company wouldn't pay it unless the Indiana Gross Income Tax was eliminated; isn't that correct?

A. You mean was not included?

Q. You would not pay the other part of the bill, the rest of the bill, the undisputed portion, if the bill carried this Indiana Gross Income Tax item?

A. We wouldn't pay the item labeled Gross Income Tax.

Q. Well, you wouldn't pay the rest of the items on the same bill, would you? You would want a bill that the check would completely cover?

A. Well, the other bill has been paid, and the Gross Income Tax hasn't been paid.

Q. I understand that, but my point, Mr. Thacker, is this: That your company, and I presume you as the officer in charge, would not pay Herlihy Mid-Continent Company these bills for work, labor, and material which included thereon the Indiana Gross Income Tax; you wouldn't have paid the amount shown exclusive of the Indiana Gross Income Tax?

A. It never came to me, other than with those items excluded. That was passed on—

The Court: You didn't have to pass on that problem?

306 The Witness: I didn't have to pass on that problem. It came to me from the people who—

The Court: It had already been eliminated by the time you got it?

The Witness: That's right.

By Mr. McNally:

Q. Well, as a matter of practice, would you, as treasurer of the company, pay a bill which included an item that the company disputed?

A. No.

Mr. McNally: That's all.

(And thereupon the witness was excused.)

Mr. McNally: I wonder whether the record is clear what I meant.

Mr. Thacker, will you stand there for a second. I meant by that question, you wouldn't pay other items—say that on a bill that you get there are items which the company does not dispute, but there is also an item which the company does dispute. You wouldn't pay on that billing, on that bill, the items not in dispute; you would insist

307 upon a bill which set forth only the items that were not in dispute; isn't that correct?

The Witness: We would pay according to our interpretation of the contract and our agreement to pay.

The Court: Well, he is asking you, if you got a bill, if you did get one, in which there were say six items, and five of them the department which vouched for it said were okay, but as to the sixth one they said, "We don't think we owe that", if the bill ever came to you under that condition, what would you do with it?

The Witness: I wouldn't pay that particular item.

The Court: Would you pay the five items and leave off the sixth, or wouldn't you pay it at all? What would you do with it?

The Witness: Well, I should like to clear this up: When the bill comes to me, or the evidence, from the accounting department, the contract department, and purchasing department, it is boiled down to the amount.

308 The Court: You don't have to make that decision?

The Witness: I don't have to make that decision.

(Said witness was thereupon again excused.)

Mr. McNally: May I ask the indulgence of the Court at this point to recall Mr. Lindeman just for that one question, or series of questions, to clear that up?

ARTHUR F. LINDEMAN, a witness on behalf of the defendant, recalled for further cross-examination, having heretofore been duly sworn, testified as follows:

Cross-Examination by Mr. McNally.

Q. Mr. Lindeman, you are the same witness for the defendant who previously testified this afternoon?

A. Yes, sir.

Q. Would you approve a bill for the defendant company which included items that were not in dispute with the sender of the bill and items which the company disputed and refused to pay?

309 A. No.

Q. In other words, you would want a bill—

The Court: You said no?

The Witness: No.

Mr. McNally: All right; that answers the question. That is all.

Redirect Examination by Mr. Friedrich.

Q. Well, to clear it up, when Herlihy sent an invoice through for payment, it first went to your department, you checked it over, as you have testified; right?

A. Of course, it went first to Michigan City.

Q. Well, yes, but it finally comes to the purchasing department?

A. That's right.

Q. Then you okay it. Then it goes to the auditing department or the accounting department?

A. Accounting department.

Q. And then they check it?

A. That's right.

Q. And then it goes to Mr. Thacker?

A. That is right.

310 Q. And then that amount, the net amount there, whatever it is, Mr. Thacker takes that as coming from the accounting department and pays it?

A. That's right; that's the amount he pays.

Mr. Friedrich: That is all.

(And thereupon the witness was excused.)

Mr. Friedrich: Well, now, your Honor, that concludes the evidence here with reference to all of these figures and data that we have in connection with these contracts. Our other evidence will be short.

The Court: Can you finish by noon?

Mr. Friedrich: Tomorrow? Oh, yes.

The Court: How do you want to handle this, do you want to argue it tomorrow, or do you want to brief it, or what?

What are your views?

Mr. McNally: I think that determination ought to be up to the Court, what the Court wants.

The Court: I don't know that I have any concrete views

until the evidence is in, but I thought we ought to be-
311 gin to think about it.

Mr. Friedrich: Well, if I may, here is my view of it, your Honor:

There has been a mass of evidence here, and it is a lot of figures and things under exhibits. I think if we delayed just a few days to study them, it would be helpful in argument to the Court, instead of just jumping in right now at the close, because you wouldn't cover it; you could summarize it a little better.

The Court: Well, I would assume that your analysis would require a little more thought and discussion, and be more comprehensive, it seems to me. You always have to balance that against the time element.

Mr. Friedrich: I think it would be more helpful to the Court if we took a day or two to go over this.

The Court: I won't be available. I am going to space out a whole week, next week, to get some things done that I have to get done, and then after that I will try to ac-
312 commodate myself to your desires; but there will be a week here that I just have to do nothing but work in my chambers; I am trying to keep that week free for that purpose, if I can.

Mr. Friedrich: That is next week?

The Court: Next week.

Mr. Friedrich: Well, it would give us next week to study all this.

The Court: It would give you next week to get this thing correlated in your own minds, and then I might hear you one day the following week.

Well, suppose we think about it overnight, with the idea that I didn't want to abruptly end tomorrow and then ask that question, and have an argument, which you might want to think about, at least overnight.

Do you want to quit for today, is that what you are suggesting?

Mr. Friedrich: I was going to suggest that we quit. The other evidence will be short, and we will be through easily by noon tomorrow.

313 Mr. McNally: My rebuttal will be very short.

The Court: Well, all right. I have matters set at nine, so we probably won't get started before ten o'clock. They will take me about an hour.

(And thereupon a recess was taken until the 22nd day of February, 1956, at ten o'clock.)

And on Wednesday morning, February 22, 1956, the trial of said cause was resumed, at ten o'clock.

Present:

The same as before.

The Court: You may proceed.

DEAN H. MITCHELL, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. Will you state your name?

A. Dean H. Mitchell.

Q. Your residence?

A. I live at 64 Glendale Park, Hammond, Indiana.

314 Q. Your business or occupation?

A. I am president and a director of the Northern Indiana Public Service Company.

Q. How long have you been with the defendant company?

A. I have been with Northern Indiana since April 15, 1924.

Q. How long have you been president of the company?

A. Since 1938.

Q. As president of the company, have you had to do with construction work, construction contracts, that Northern Indiana has had done in northern Indiana?

A. Yes, sir.

Q. Just briefly state the extent of that work, or those contracts.

Mr. McNally: I object to it, as being immaterial. I don't see any materiality to the issues in this case.

Mr. Friedrich: It is not material except to show that in the course of dealings Mr. Mitchell had many contracts, the company had done much construction work.

315 The Court: If it is preliminary, I think I will overrule the objection.

Read the question.

(Question read.)

A. My work with contracts is very great. I review all of the contracts that we make with contractors of any size at all, and that would be probably, oh, ninety-five per cent of them.

By Mr. Friedrich:

Q. Now, referring to 1947 and 1948 and the contracts that are involved in this action, known as the Herlihy Mid-Continent contracts, for the construction of the Generating Station at Michigan City, do you have those in mind?

A. Yes, sir.

Q. Did you or the defendant company employ a firm of engineers in Chicago known as Sargent & Lundy?

A. We did.

Q. What was the work done and to be done by Sargent & Lundy?

Mr. McNally: I object to that. Up to this point, they have been relying upon the contracts which they put 316 in evidence as to what work Sargent & Lundy was to do. I don't think that the witness should be permitted to go beyond those contracts.

The Court: What about that, Mr. Friedrich?

Mr. Friedrich: Well, the answer is two-fold. It is true that we put in the contracts of Sargent & Lundy. They were introduced conditionally, that is, the Court said he reserved decision as to whether they would stay in the case, or not, so that if later on the Court should feel that those contracts were out, we would need the evidence of Mr. Mitchell, to put it in.

Secondly, we were requested to make an admission in this case, which we did, and the admission was here and used by the plaintiff yesterday. It was only used with reference to the letter or correspondence that passed with Mr. McNally and certain people of the plaintiff company, but in the admission, as appears of record here, we were asked to admit certain things about Sargent & Lundy, what
317 their status was, and things of that kind. That was not put in. So I think now that the evidence is certainly admissible to cover that situation, where they asked us to admit, but the admission was accepted in part only.

The Court: Excuse me, I would like to hear your response, Mr. McNally, but I have in my notes that Mr. McMeen testified that Sargent & Lundy did everything except letting contracts. That was part of his testimony, so apparently there were questions and answers as to what they were to do for the defendant.

Now, this contract, I haven't analyzed my notes, as to the admission of that contract, that it was conditional. Who put it in?

Mr. McNally: They put in three contracts—has your Honor finished?

The Court: Yes, I have.

Mr. McNally: They put in three contracts, and they further elicited testimony, which was admitted, that the con-

tractual relationship between the defendant and Sar-
318 gent & Lundy was governed by these contracts. Now, to permit this witness to state something beyond those contracts I think would be clearly incompetent, because I assume what he is going to say, I have some idea of what he may say, that is, from the questions made, not otherwise. Now, clearly it was on their own evidence and side of the case that they introduced these contracts and established, on their side of the case, that the contractual relationship between this defendant and Sargent & Lundy was governed by those contracts.

The Court: There was no statement to that effect?

Mr. McNally: Yes, the question was asked, to that effect.

The Court: By whom?

Mr. McNally: By Mr. Friedrich.

Don't you recall that?

Mr. Friedrich: Who did I ask it of?

Mr. McNally: I think it was Hartman.

Mr. Friedrich: I didn't ask that of Hartman.

319 The Court: What is your answer, Mr. McNally, to my first question, that you asked Mr. McMeen what Sargent & Lundy were to do for the Northern Indiana Public Service Company?

Mr. McNally: It is two-fold. First, I showed him the contract that was attached to their admission, particularly when he said that he qualified my question. Then I showed him the provision of the contracts.

The Court: He said "assist".

Mr. McNally: Yes; that they prepared the contracts. What he said finally, as I recall it, was, "We didn't sign the contracts". Then after that, and on the defendant's side of the case, they introduced these contracts and elicited testimony that the contractual relationship between Sargent & Lundy and the defendant company was specified in these contracts.

The Court: Is it your contention, Mr. Friedrich, that there were further duties, that Sargent & Lundy were to do more or less than specified in these contracts?

Mr. Friedrich: No. I was going to prove, by my next question, or attempt to prove, by my next question,
320 that Sargent & Lundy were consulting engineers; I am not varying the terms of the contract; but that they had specific instructions from Northern Indiana, which Mr. Mitchell knows about, that they had nothing to do with the Indiana Gross Income Tax. That simply corroborates the evidence of Mr. McMeen. We asked Mr. McMeen, and then that question came up. He said they had nothing to do with the contracts. But let's be clear about the contracts. The contracts of Sargent & Lundy were not offered by them, but since they started to question Mr. McMeen, who was their witness, we then asked Mr. McMeen and put in as part of the cross examination these contracts which were attached to the evidence that we admitted under the request for admissions that counsel made.

Now, I have a right, it seems to me, or Northern Indiana, the defendant, has a right, to now explain and corroborate what Mr. McMeen, their own witness, said.

The Court: And what did he say?

321 Mr. Friedrich: He said that they had only to do with the work and material, labor and material. They had nothing to do with the Indiana Gross Income Tax. That's one thing he said. The second thing was, when he said, "We didn't sign the contracts," that meant the contracts with the contractors, not the three contracts that are in here. Let's not be confused about it.

The Court: Oh, no; I don't think anyone misunderstands that.

Mr. Friedrich: Well, that's how I understood counsel's statement. Sargent & Lundy did sign the contracts. So his testimony that he didn't sign the contracts meant the contracts of the materialmen and contractors.

Mr. McNally: Will you let me review it again? I asked McMeen—

The Court: No; wait.

Mr. McNally: I beg your pardon.

Mr. Friedrich: Also, this testimony is competent on this subject. There is in evidence, although it is in conditionally, a memorandum that Sargent & Lundy had.

322 The man didn't bring the memorandum out, but we had a copy of it, and he identified it as instructions from Northern Indiana with reference to what they were to do, and with particular reference to the Gross Income Tax. This evidence would be further admissible to corroborate and to establish what was in that memorandum, which is now in evidence.

So on any theory the testimony of this witness would be admissible.

Mr. McNally: Where is the memorandum which you refer to, that was admitted?

Mr. Friedrich: Well, it came in as a part of this, Defendant's Exhibit 1. That arose in the cross examination of Mr. McMeen.

Mr. McNally: Well, McMeen was your witness. I called him under 43(b).

Mr. Friedrich: You can't make a man our witness unless we call him. You can't give us a witness without our consent, certainly.

The Court: May I see that?

Mr. Friedrich: Yes. (hands instrument to the

323 Court.)

The Court: Well, I am inclined to overrule the objection, if it means a matter of rebuttal.

Mr. McNally: This is obviously going to be some oral conversation between the witness, I assume, and Sargent & Lundy, at which we were not present.

Now, this letter refers to the manufacturers. We were

not a manufacturer. And the testimony is clear that McMeen ultimately said that these were the contracts, and they operated under the contracts, and I remember specifically (I may have been wrong that it was Hartman, maybe it was McMeen) that the contractual relationship was governed by these contracts. Now, if there was—if there was—any direction or instruction from this gentleman who is on the witness stand to Sargent & Lundy that we weren't a party to, that couldn't be admissible. And they have put in this letter of instruction as to manufacturers, which does not apply to us, but certainly they shouldn't be

permitted to go further by this witness and put in
324 testimony of some instruction that they gave to Sargent & Lundy, which Sargent & Lundy never communicated to us, and that Northern Indiana never communicated to us.

The Court: Well, of course, it's a matter of agency, and I assume that as to a general agent, unless his powers are limited, there are certain legal principles that are applicable, but we haven't reached the application of these legal principles that are applicable to the facts. What we are trying to do now is get the facts. Of course, I am not ruling on your assertion that you can't be bound by something that you were not a party to, insofar as conversations between the principal and the agent. I don't know how far a principal can limit his agent, how far he can go by that kind of conduct; I am not ruling on that.

Mr. Friedrich: That is another reason why this evidence is admissible. Counsel has attempted to prove, I think that he has failed, but the Court may have different

ideas than mine, that Sargent & Lundy were agents
325 of Northern Indiana. I think that the record would show, when you examine the contracts, that they are independent contractors. But adopting his theory of the case—

Mr. McNally: Before you go on—

The Court: Wait until he finishes.

Mr. Friedrich: Adopting the theory of agency, which he is attempting to adopt, and has established, a principal always has the right to show the scope of authority, the scope of employment, of the agent. How else could you establish it? And the purport of the testimony of Mr. Mitchell would be to show, it goes down to this question of the Indiana Gross Income Tax, whether they had authority to do certain things, or whether they didn't.

The Court: The holding out may neutralize the limitation, but I am not ruling on that.

Mr. Friedrich: Well, we have a certain right to show what the instructions of Northern Indiana to Sargent & Lundy were. It is on their theory of the case. We
326 have a right to rebut it and answer it.

Mr. McNally: I say it doesn't make a bit of difference whether Sargent & Lundy was an agent or an independent contractor. There was a written contract between Sargent & Lundy and the defendant, and the defendant itself in this case has established that, governing the contractual relationship. But in any event, your Honor, this is the point I want to make, in any event this defendant placed Sargent & Lundy in the position of dealing with the plaintiff, and what was done in the course of those dealings surrounding the execution of the contract is admissible, but not some oral conversations that this gentleman may have had with anybody, with Sargent & Lundy, without anybody from the plaintiff present.

The Court: I am not going to rule that you are wrong on the proposition, except that I am going to overrule the objection and let the evidence in.

327 Mr. Friedrich: Will you read the question, please?

(Question read.)

A. They were hired in a consulting capacity. They had nothing to do with gross income tax. What they were to do was to advise us about the labor and materials and the engineering, and the part they were to play was plainly advisable. So far as the payment of bills was concerned, that would be up to the officers of the company.

Mr. McNally: I move that the answer be stricken, on the grounds stated, following my objection, and on the additional ground that the answer is wholly a conclusion of the witness.

The Court: Well, overruled on the first ground. Unless it is brought out that that was a bilateral communication,—if it was just an understanding of Mr. Mitchell or the Northern Indiana Public Service, I think it would be purely a one-sided understanding.

Mr. Friedrich: I will ask Mr. Mitchell an additional question, but the Court will have in mind Mr. McMeen's memorandum that says that Northern Indiana told him 328 certain things.

The Court: Whatever the details are.

Mr. McNally: The exhibit the Court just looked at?

Mr. Friedrich: Yes.

Mr. McNally: Was there a further memorandum than that?

Mr. Friedrich: I am going to ask.

By Mr. Friedrich:

Q. The instructions to Sargent & Lundy as to what they were to do, were they communicated to Sargent & Lundy, did they know about them?

A. I talked to our purchasing department, I told—

Mr. McNally: I object to that. It is not responsive to the question.

Mr. Friedrich: Well, I think it is a preliminary statement that the witness makes.

The Court: Well, I will overrule.

A. I talked to our purchasing department and told them to advise Sargent & Lundy that we did not intend to pay the gross income tax on contracted jobs, unless specifically and by direct wording in the contract it
329 had so been agreed to.

Mr. McNally: I move that that answer be stricken. The answer is a conclusion of an instruction to the purchasing department of the defendant itself, not to Sargent & Lundy.

The Court: Well, unless other prior evidence or subsequent evidence hooks this up with Sargent & Lundy, it will have to be stricken on motion.

By Mr. Friedrich:

Q. Are you able to state, Mr. Mitchell, whether or not the instructions were communicated to Sargent & Lundy?

Mr. McNally: I object to that. That is certainly not the best evidence.

The Court: Well, overruled, if he knows personally.

A. They were, yes, sir.

Mr. McNally: I move that the answer be stricken, on the ground that it is a conclusion of the witness.

The Court: You can inquire as to his knowledge.
330 I will overrule the objection.

By Mr. Friedrich:

Q. Now, I think you have covered this, but I will ask you this question:

Did Sargent & Lundy have anything to do with approving or disapproving any claim for Indiana Gross Income Tax under invoices submitted by the plaintiff in connection with the work it did at Michigan City, Indiana, under the contracts sued on herein?

A. They did not.

Mr. McNally: I object to that, as clearly incompetent, and a conclusion, not the best evidence.

The Court: I think it is a conclusion. I will have to sustain the objection, and strike the answer.

By Mr. Friedrich:

Q. Now, Mr. Mitchell, do you have in mind the contracts with Herlihy, the plaintiff in this case?

A. Yes, sir.

Q. And particularly Section 15(h), which has to do with the taxes that are to be included in the net cost of the work?

331 A. Yes, sir.

Q. I will show you here Section 15(h).

Section 15, subsection (h) under that, has this language: "Amounts required by any federal, state, or local taxes applicable to the work, including old age benefit and unemployment taxes."

You have that in mind, as it was in these contracts?

A. I do, yes, sir.

Q. Now, you signed some of these contracts as president of the company. At the time these contracts were signed by you, as to those that you did sign, did the phrase, "taxes applicable to the work," have a meaning in the trade, that is, in construction work of this kind?

Mr. McNally: I object to that, as clearly incompetent.

The Court: Well, as long as this question of usage has been abandoned, I think that it is not within the scope of the issues.

Mr. Friedrich: Well, it is this—

Mr. McNally: No pleading about that by them in their answer at all.

Mr. Friedrich: This is the theory of the defendant 332 in reference to this:

We recognize that custom and usage is out of the case. This hasn't anything to do with custom and usage. As we conceive the law, and I have the text books on it, where you have a technical contract that uses language of

this kind, and where the contract is equivocal, you have the right to resolve that equivocation.

It has been our stand in this case that this contract is unambiguous, clear on its face, and the Court must determine the meaning of 15(h) from the conduct of the parties.

Now, counsel has taken the position that this contract is equivocal; he has taken the position that that means it can include the Indiana Gross Income Tax.

The Court: Well, there are two theories. One, that they talked about it, not necessarily talked about it, but that there were certain acts, certain conversations, that this
333 contract was drawn in a certain context of facts, conversational or otherwise, which, as I understand his theory, make this contract mean his way of thinking, the way he says they should be interpreted. He also advanced, in the pleading stage, the other way, that is, namely, usage and custom, that these words have a particular meaning with people who contract this way, who sign these contracts. He has abandoned that theory, so he is left with this other.

Am I stating this right, or not?

Mr. McNally: Except as to custom and usage. Custom and usage wasn't as to interpretation of this language. The custom and usage as to what was customarily and ordinarily done in the State of Indiana with reference to it. Now, that has been abandoned.

As I see the question of Mr. Friedrich, what he is trying to do is to circumvent the rule, which is as positive and clear as anything can be, that no litigant in a controversy over the meaning of a contract can say "I intended". Now, that's what he is trying to do. There isn't a case
334 in the United States which holds that. In fact, every state in the Union condemns it. The facts surrounding the execution of the contract, the Court can accept.

I say it is clear that they were to pay this tax, but I say there must be some uncertainty arise, and I met that uncertainty by the evidence. Not conversations, I respectfully differ with the Court; I was very careful not to ask McMeen any conversations at all, and I was very careful not to ask Smith, our other witness, any conversations at all. If any conversations were brought out, they were brought out on cross-examination of those two witnesses, because I recognize the rule that the statements—the statements—of such witnesses are not admissible.

Now, I don't think that this witness should be permitted to say, either directly or indirectly, how he construed this provision. It is my contention,—

The Court: Well, I understand your position.

Mr. Friedrich: Well, the theory of this evidence, we
335 are offering it in rebuttal to the position of the plaintiff. This is a statement of the law, quoting 20 American Jurisprudence:

"Where the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contracts and to determine the object on which it was designed to operate."

The Court: What was in the minds, though, has to be determined, not what was in the subjective minds, but I have to look at it from the objective facts, isn't that true? You can't ask each contractor, each party to a contract, what he was thinking about when he signed the contract. You may try to find out what he was thinking about, but you do that by looking at his conduct.

Counsel says you can't inquire as to what they
336 said. I am not sure of that. But at least you have to look at it, you have to try to go back to that period.

and try to find out what was said and done, maybe only what was done, to see what was in the minds of the people who signed the contract. To ask, at a subsequent time, what were you thinking about at that time, what did you have in mind, I don't understand the law to be that you can get into that.

Mr. Friedrich: Well, I understand the law to be that you can, with this limitation: Here is a contract with certain words. Now, it is up to the Court to finally determine what those words mean. Does it include the Indiana Gross Income Tax, or does it exclude it? Evidence is in here now, and practically complete, on both sides as to the conduct of the parties in determining the interpretation that they placed upon those words, but as a further aid to the Court it is our contention, under these cases, that you can determine and ask the parties—I don't suppose you could ask a party, "What did you intend," but if a 337 word in a trade has a certain meaning, like "taxes applicable to the work," that if he had in mind when he signed that contract that general meaning, we would be entitled to show that.

Just here they cite a case—

The Court: It is not the party's private idea of what he had in mind of the meaning. If a word has a common accepted meaning in the trade, that is one thing, but a party to a contract can't have in mind that it has a particular kind of connotation, and then later on, if there is a dispute, say, "Well, when I signed that contract, that's what I had in mind."

Mr. Friedrich: Well, it comes down to this. The words, "taxes applicable to the work," are common words that we, who are not utility men or construction men, might have one interpretation of those words, but to a man in the business, when those common words are used, they may mean, or have a shade of meaning, that I, a common layman, wouldn't attribute to them.

Now, in this 20 American Jurisprudence, at page
338 995, they abstract this case. I was not able to get it,
because the Court House is closed today on account of
Washington's birthday, but this is what they said:

"Where one of the claims submitted to arbitrators is the alleged breach of a contract to 'work' "—and "work" now is in quotation marks, that's the word—"a certain street"—here was a contract which said, "you are to work a certain street"; now, those are common words used every day by everybody,—"parol evidence is admissible to explain the special meaning of this term as understood by the parties at the time the contract was made."

That isn't custom and usage; it is a trade term, that's true, but it isn't custom and usage. But a party has a right to say, if certain words mean certain words in a trade, that he signed the contract with reference to that.

The Court: If one party said, "I thought it meant this," and the other party said, "I thought it meant
339 the opposite," where would it leave the Court?

Mr. Friedrich: It would leave the Court in this situation: You wouldn't decide the case entirely on what the parties said. I think what the parties did is more controlling, but that's the province of the Court, to weigh the evidence and give such weight to certain evidence, and less weight to other evidence, but you would take into consideration, not only this parol evidence as to what the intent of the parties was at the time of the contract, but you would also take into consideration their conduct.

Now, when you come to construe this contract, that law is covered in, I just picked it up, 12, where we are going to construe the contract, and the duty of the Court with reference to it, there you will find, I have a note here, 237, that would answer the question that the Court just put:

"Words will be given their ordinary meaning when
340 nothing appears to show that they are used in a dif-

ferent sense, and no unreasonable or absurd consequences will result from doing so."

And when you go over to this Section 237 you come to technical words and local or trade usages. Now, there is a difference between the two.

I am not here on the theory of any usage, although words in a contract are generally to be given their usual and primary meaning at the time of the execution of the contract. Words of art, or words connected with a peculiar trade, are to be given the signification attached to that by experts in such trade, unless it appears that they were used in a different sense.

The Court: Well, I think that I have my mind pretty well made up on this. I think there is this kind of a situation: Where a word which either is technical or has a local meaning, that can be explained, can be testified about, as to what that word means, either technically or as a local meaning other than maybe its ordinary meaning, that
341 is one kind of inquiry. Another is where the parties communicate between themselves, either by conduct or perhaps by conversation, that they are going to use that word in a particular meaning, not necessarily coinciding with the technical, or ordinary, or particular local meaning; they might make thir own private conventional meaning; but they have to do it between them; neither side can say later, "I meant this," and not have it communicated to the other side, "when I signed the contract, I had in mind this private meaning to those words."

As I understand it, that is what you are asking Mr. Mitchell, what he had in mind when this contract was signed.

Mr. Friedrich: This is what I had in mind, that the words, "applicable to the work," have a certain meaning, considering technical contracts to do this kind of work in the utility trade.

The Court: If it is general meaning, that that is what people that sign these contracts mean, I am going to permit him to testify, but if it is what he had in mind
342 when he signed the particular contract, I am going to sustain the objection.

Mr. Friedrich: I asked him, did these words have a connotation in the trade; I think that was my language; and I thought that certainly that evidence was competent, because if they do have a connotation in the trade it is an inference and a presumption that Herlihy, who under the evidence was operating in four states, and had a large amount of work, with the figures in here as to all they did, and the overhead they had, would know about that meaning of those words in the trade.

Now, that is my theory, and that is what the cases hold.

The Court: All right.

Mr. McNally: I am not going to say anything further. This case is about at the end. There was no indication or notice whatsoever that any such defense was going to be urged. Now, the rebuttal that such words have a connotation in the trade as Mr. Friedrich calls it, could take
343 twenty witnesses to determine whether there was any such custom and usage or construction of such words in the trade.

The Court: I am going to overrule the objection, but if you feel at this point that you should rebut it, and are not prepared to, I am going to give you an opportunity to rebut whatever the testimony is on that point.

Mr. Friedrich: Well, let's start out—

The Court: Better go back to that question, see what it was.

(Question read.)

A. Yes, sir.

Mr. McNally: Are you going to ask another question?

Mr. Friedrich: I am going to ask him what the meaning was.

Mr. McNally: Put the question.

The Court: Put the question.

By Mr. Friedrich:

Q. What was the meaning of those words in the trade with Reference to the Indiana Gross Income Tax?

344 Mr. McNally: I object to that. He clearly hasn't qualified Mr. Mitchell as an expert or one with sufficient knowledge.

The Court: I think I will sustain the objection, unless there is qualification.

Mr. Friedrich: May I now attempt to qualify him?

The Court: Yes.

By Mr. Friedrich:

Q. Mr. Mitchell, since 1938, I think you have testified, you have had work in connection with construction contracts of Northern Indiana; is that correct?

A. I was president of the company at that time and had connection with all contract work from that time on, and prior to that time.

Q. What was your connection prior to that time?

A. I was vice-president and general manager from October, 1934, on, and during that time, with an absent president, had the same control over contracts that I now have.

Q. Well, from the time you have had to do with construction contracts, going through them, approving them, and signing them, give us an idea as to how 345 many those were, if you can.

A. Oh, they would reach into the thousands, the numbers that I have reviewed.

Q. Would you have any idea as to the amount of the contracts, that is, the amount of the contracts covering that period? I know you can't be exact, but could you give us an idea?

A. Well, our construction program for the last several years has run between $15,000,000 and $22,000,000, and

prior to that ran in the neighborhood of, oh, from $5,000,000 or $6,000,000 to $15,000,000, and I have reviewed all of the contracts applicable to the construction during that long period.

Q. And were the contracts that are involved in this suit among those contracts that you reviewed?

A. Yes, sir.

Q. In reviewing these contracts, did you review them with reference also to the allowance and disallowance of taxes?

A. Yes, sir.

Q. Since 1933, when the Indiana Gross Income Tax Act was enacted, did you review those contracts, and the languages of them, with reference to the Indiana Gross
346 Income Tax?

A. Yes, sir.

Q. And did you review these particular contracts that are involved in this lawsuit with reference to the Indiana Gross Income Tax?

A. Yes, sir.

Q. Now, let me again state the question, or put the question to you:

What was the meaning in the trade of the words in these contracts, "taxes applicable to the work"?

Mr. McNally: I object to the question. He clearly hasn't qualified the witness to testify to such usage.

The Court: Well, I am going to overrule it. I think it may go to the weight.

Mr. McNally: He is simply asking this witness what interpretation he put on the contract he reviewed. It is the Court's province, I submit respectfully, in this case to determine what the contracts in issue in this case are.

The Court: Well, I think it goes to the weight. I will overrule the objection.

347 A. It is generally considered in the industry that "taxes applicable to the work" has to do with those direct taxes on labor and materials as the job is under its way; that gross income tax is an overhead, and is a tax on the receipt of money in Indiana.

Mr. McNally: I move that the answer be stricken, for all of the reason I have stated since this matter came on.

The Court: I am going to overrule the motion, but I will give you an opportunity, if you can't rebut it today, so that you can bring in any counter-evidence on this point that you may desire.

Mr. Friedrich: That is all. You may cross-examine.

Cross-Examination by Mr. McNally.

Q. Mr. Mitchell, are you familiar with the Standard Oil Company of Indiana?

A. I know of the Standard Oil Company, yes, sir.

Q. They do quite a bit of construction work, and have done so in Indiana, haven't they?

A. I presume they have, yes, sir.

Q. Do you know that the Standard Oil Company of
348 Indiana has paid the Indiana Gross Income Tax to contractors under cost-plus contracts?

Mr. Friedrich: Well, I will object to that. That's not proper cross-examination, as to what the Standard Oil Company may do.

The Court: If they pay the tax with a certain provision in their contracts, it might be very important, but to ask the question whether they paid it, or not, I don't believe is within the scope of this examination. What these words in the contracts mean is what we are talking about. If the Standard Oil Company pays the gross income tax with this kind of language, then of course I would overrule the objection.

Mr. McNally: Well, he says that there is a general usage.

I understand your Honor's point, but I think that his answer was so broad, and having in mind the qualifications your Honor stated, I think I ought to be permitted to ask him about specific cases under cost-plus contracts, even though I am not prepared to show certainly at this
349 time, and I am going to be honest with the Court, I don't know, what each contract of Standard Oil is. I have in mind some contracts under cost-plus where they were paid by the Standard Oil Company to the contractors.

The Court: What was the question?

(Question read.)

The Court: Well, I will overrule the objection.

A. No, I do not.

By Mr. McNally:

Q. In this particular job, of your Generating Station on Lake Michigan at Michigan City, you paid Babcock & Wilcox the Indiana Gross Income Tax, didn't you?

A. Yes, sir. It was specifically stated in the contract that we would, and we did.

Q. You based your statement that "taxes applicable to the work" does not include the Indiana Gross Income Tax on what you answered to Mr. Friedrich's questions, in other words, your reviews of the contracts your company had; is that correct?

The Witness: May I have that question read, please? I am not sure that I get it.

350 (Question read.)

The Court: It is a little bit confusing.

By Mr. McNally:

Q. When you gave your answer, what is generally considered the meaning of "taxes applicable to the work," that it does not include the Indiana Gross Income Tax, I presume—and I want you to tell me if I am correct in

doing so—that you predicated that testimony upon your vast experience in reviewing all of the contracts, construction contracts, that Northern Indiana Public Service Company has had since 1934?

A. Oh, not entirely, no, sir. We generally have meetings of the presidents of the different utility companies in the state; we have our state association both in the gas industry and in the electric industry, and these things are regularly discussed among us, and in those discussions that we regularly have we consider that the term "taxes applicable to the work" means those direct taxes that are in connection with the job while it is under way; that the gross income tax is not of that character but is a tax that is an overhead, and that is a tax upon moneys received in Indiana.

351 Q. When was the last time that you discussed the meaning of "taxes applicable to the work" with anyone, when, where, and with whom?

A. Oh, I don't remember exactly as to where and as to with whom. These things are—

Q. That is the answer, you don't recall?

A. I can't recall specifically, no, as to where, and with whom.

Q. Were any contractors present who were doing work for any of these utility companies?

A. Oh, no.

Q. This was a discussion or series of discussions, as I take it; Mr. Mitchell, among presidents of utility companies or officers of them, at which you were present, and in which you people felt that the Indiana Gross Income Tax should not be reimbursed to the contractors?

A. That's right.

Q. Now, with your extensive experience, I grant it, in reviewing these contracts, plus these discussions that you have, we have now on what you based your answer to Mr.

Friedrich's last question, that it is generally considered that the Indiana Gross Income Tax is not included in
352 the language, "taxes applicable to the work," am I correct in assuming that?

A. Yes, sir.

Q. Did you, Mr. Mitchell, personally read the contracts that are involved in this suit which have this disputed clause?

A. Yes, I did.

Q. And then you signed at least some of the contracts?

A. I signed some of the contracts. I don't think I signed all of them here, but I signed some of them.

Q. When you signed those contracts, you were conscious of the fact, of course, that there was such a state law, or law in this state, called the Indiana Gross Income Tax?

A. Yes, sir.

Q. I presume you read the contracts before you signed them?

A. Yes, sir.

Q. At the time you read the contracts and signed them, were you conscious of any other law of the State of Indiana that could be at all involved or come under that language?

A. Come under which language, please?

353 Q. I will be specific and show you a photostatic copy. The language under 15(h) of the contracts, "amounts required by any federal, state, or local taxes applicable to the work, including old age benefit and unemployment taxes".

A. Yes; old age benefit and unemployment might be applicable.

Q. You were conscious of those, of course?

A. They were specifically stated.

Q. But that wasn't my question, Mr. Mitchell.

At the time you read these Herlihy contracts, and at the time you signed them, were you conscious of any other law

of the State of Indiana that could have referred to, or could come under, or could come within, the meaning of the clause that you and I have just read, 15(h), in the contract? Were you, or were you not?

A. The contractor—

Q. No; were you, or weren't you?

A. Yes; straight property tax would come under it.

Q. What property tax, real estate tax?

A. Well, the contractor has materials here in Indiana, and if they are here in Indiana for certain periods, as
354 I understand it, they are taxable, can be valued and taxed, and if that did occur, he would then have that kind of a tax to pay.

Q. Am I to take from your answer that you had in mind under this clause that Herlihy Mid-Continent Company would pay, or you would pay, the personal property tax on materials that Herlihy might bring to the job?

A. We would pay any tax—

Q. No; did you have that in mind, is that what you had in mind?

A. Will you state it again, please?

Mr. McNally: Will you read the question, please?

(Question read.)

A. Any that were applicable to the work, we would pay.

Q. Do you mean to say that you understood the law of Indiana to be that there would be a personal property tax imposed on the materials that would go into your Generating Station before they became a part of it?

A. No, I didn't consider the Indiana law; I knew that if there were such a tax, that under the clause, "taxes applicable to the work," we would pay the tax.

355 Q. So that there won't be any question that this disputed clause did not refer to any Indiana state personal property tax, your company never paid a per-

sonal property tax on materials that contractors brought in to do a construction job for you, did it?

Mr. Friedrich: I object to that.

Mr. McNally: I just want to clarify it.

Mr. Friedrich: It is going far afield. It is not proper cross-examination. It is cross-examination upon an immaterial point. It couldn't test the competency of the witness. The Indiana tax laws, under the tax that he is discussing, we know are highly technical. It all relates to a certain date, March 1st, what was here on March 1st. What good is that going to do in this case.

The Court: Except, what do these words mean? They have some meaning. What do they mean?

Mr. Friedrich: All right; I will withdraw my objection.

Mr. McNally: Do you want me to repeat it, Mr. Mitchell?

The Witness: Please.

356 By Mr. McNally:

Q. Did your company ever pay or repay a contractor for personal property tax of the State of Indiana on any materials used in any construction job or jobs for Northern Indiana Public Service Company?

A. No, sir.

Q. Did your company, during your tenure since 1929—

A. 1930.

Q. Did your company ever reimburse a contractor on any job that Northern Indiana Public Service ever had for personal property tax of the State of Indiana on materials that went into a building or generating station or any other construction job?

A. No, sir.

Mr. Friedrich: Let me renew my objection. It is again cross-examination upon an immaterial point. It is not proper cross-examination.

The Court: Overruled. There was an answer.

By Mr. McNally:

Q. Now, Mr. Mitchell, was there any other tax that you were conscious of, of the State of Indiana, at the time
357 you read the contracts involved in this case and at the time you signed the contracts that you did sign? Were you conscious of the fact of any other law of the state, and, if so, what law?

A. I don't remember of being conscious of any other tax at that particular time. That was seven or eight years ago.

Q. Well, are you conscious of any now?

A. No.

Mr. McNally: That is all.

(And thereupon the witness was excused.)

The Court: I think we will take a couple of minutes out.

(A short recess was taken.)

Mr. McNally: I now move the Court, if the Court please, to strike from the direct testimony of the previous witness, Mr. Mitchell, that part of the testimony which was to the effect that there is a meaning or usage in the trade with regard to the construction of the clause, "taxes applicable to the work," or the whole disputed clause in Section 15(h) of these contracts, upon the ground that the cross
358 examination showed that there was no qualification of the witness to give such testimony, he saying that he predicated such testimony upon a review of the contracts which the defendant had in the past plus discussions which he and other officers of utility companies have had that a utility company should not pay or repay to the contractors the Indiana Gross Income Tax, and it clearly shows that the original proof of the usage of the trade construed the language involved in this case, as the witness stated.

The Court: I am going to deny the motion. I will say, of course, that you may argue on final argument these matters, and also that the weight of the evidence of course is distinguished from admissibility.

Mr. Friedrich: Mr. Schotters.

BERNARD W. SCHOTTERS, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. Will you state your name?

A. Bernard W. Schotters.

359 Q. Your residence is what, where do you live?

A. 737 West Kesler Boulevard, Indianapolis, Indiana.

Q. What is your business or occupation?

A. I am in the utility business, sir. I am vice-president, secretary and head of the legal department of the Indianapolis Power & Light Company.

Q. How long have you been with the Indianapolis Power & Light Company?

A. The 26th of this month it will be thirty years.

Q. In that capacity as you have described with the Indianapolis Power & Light Company, was it your work to review and prepare construction contracts?

A. Not for the full thirty years, no, sir.

Q. Well, for how long did you do that?

A. Since 1934, sir.

Q. Since 1934 you have dealt with construction contracts?

A. Right.

Q. And in those contracts, dealing with them, did you review them as to language?

A. Yes, sir.

Q. Did you also prepare some?

A. Yes, sir.

360 Q. In those twenty-some years that you have been with the Indianapolis Power & Light, handling construction contracts, can you tell, briefly, the extent or volume of that work?

A. On the average, construction of major importance, or should I say contracts, particularly when you are building generating stations, I would say you would have in the neighborhood of from 150 to 200 contracts involved; however, the major portion would be some 25 to 30 contracts, as far as value is concerned, major contracts.

Q. Did you have any contracts, review contracts or prepare them, for the construction of electric generating stations?

A. I have, sir.

Q. And in these contracts, over this period of time, I presume you have dealt with many contractors?

A. Yes, sir.

Q. Now, Mr. Schotters, I direct your attention to the contracts that are involved in this litigation, and particularly to Section 15(h), which reads as follows:

"Amounts required by any Federal, State or local taxes applicable to the work, including old age benefits and
361 unemployment taxes."

If you care to examine further sections of the contract, you may do so.

A. Okay.

Q. Now let me ask you, do those words in that section, particularly the words "taxes applicable to the work", have a connotation in the trade in Indiana, and did they in 1948?

Mr. McNally: I object to that. There is no pleading or assertion or allegation in the answer that raises any such

defense; and, secondly, he has not qualified the witness; and, thirdly, the words themselves are not subject to a particular meaning in the trade rule. As your Honor said previously, they could have a particular meaning as to this contract, but the words themselves cannot, by any stretch of the imagination, lend themselves to what they mean in the trade, and this witness has not qualified himself as to any such meaning or meanings of any kind in the trade.

The Court: I am going to overrule the objection, with these observations:

That you may further cross-examine at least as to
362 his qualifications or the lack thereof, if you wish to go into that. That goes to the weight, in any event.

On the other two questions that are the basis for your objection, I am going to give you an opportunity, if you wish to avail yourself of it, for further evidence, even though you are not prepared today to meet it on this point.

As to the third objection, I think that is a matter that can be argued on final argument as to the legal import of these words.

Objection overruled.

Read the question.

(Question read.)

A. Yes, to me they had the connotation that in the utility business—

Mr. McNally: I object to the answer. He started out, "to me". That is clearly incompetent.

The Court: Well, I will have to sustain, if it is just your private understanding.

By Mr. Friedrich:

Q. What was the connotation in the trade of the
363 language in the contracts sued on here?

You said it did have a meaning. Now the question is, what is the meaning?

Mr. McNally: I submit that that is leading and suggestive. The witness apparently started to say what it means to him, and that is clearly incompetent.

The Court: Well, I'll ask a question.

Do these words have any recognized meaning, or do they have a particular meaning to you, as distinguished from one that is generally known?

The Witness: In the trade, I think they have the meaning of that which—

The Court: I am not asking you what the meaning is, but whether or not these words have a meaning that is recognized among people who use them.

The Witness: I think so, yes, sir.

Mr. McNally: I further object to the answer to the question because he says, "I think so."

The Court: Well, that goes to the weight. I will overrule it.

364 By Mr. Friedrich:

Q. What was that meaning?

A. That they are limited strictly to those taxes which are directly applicable to the work, and not indirectly, not an indirect tax, that which can be ascertained by the work itself.

Q. You are familiar with the Indiana Gross Income Tax, I take it, are you?

A. Yes, sir.

Q. Now, then, let me ask you this: Would those words in the trade include the Indiana Gross Income Tax?

A. No, sir.

Mr. McNally: I object to that. That is clearly incompetent, your Honor.

The Court: Incompetent, what do you mean?

Mr. McNally: If he would say, do they apply to the Indiana Gross Income Tax, that is what the Court has to decide.

The Court: Well, of course; the only thing that the Court is asking is whether or not these words have a recognized trade meaning, subject to all of the matters that I have indicated.

365 Overruled.

The Witness: May I have that question again, or did I answer it?

(The answer was read.)

The Witness: No more so than—

Mr. McNally: I object to any volunteer statement.

The Witness: All right.

Mr. Friedrich: Well, is it part of the answer to this question, no more so than—

The Witness: If I may restate my answer, no, sir, no more so than the federal income tax.

Mr. McNally: I move that the answer be stricken, on the grounds previously urged.

The Court: Overruled.

Mr. McNally: And, further, that the latter volunteered part is not an answer to the question. That volunteered answer, your Honor, I think shows that it is all personal with him.

The Court: Well, you can cross-examine him on that.

By Mr. Friedrich:

366 Q. Well, so that the record may be clear, the answers that you have made to the questions here are not entirely personal to you, are they; they relate to the trade?

A. Right, sir.

Q. When you said "I think," and "I mean," was that your way of stating that the trade means or adopts the interpretation that you have stated, that it is not entirely personal to you?

Mr. McNally: I object to the question, as leading and suggestive.

Mr. Friedrich: Well, I am trying to get the record straight, in view of the objection that was made.

The Court: Well, I will sustain the objection.

By Mr. Friedrich:

Q. In your capacity there, dealing with contracts for Indianapolis Power & Light, I presume you have dealt with this Indiana Gross Income Tax since the tax was adopted or passed in 1933, have you not?

A. Yes, sir.

Q. All through the years, up until the present time?

367 A. Yes, sir.

Q. And is it a fact, Mr. Witness, that under the many contracts that you had, the Indiana Income Tax, payment of it, was taken into consideration?

Mr. McNally: I object to that. It is along the same line that the Court previously ruled on as to questions of mine.

The Court: I will sustain the objection.

Mr. Friedrich: You may cross-examine.

Cross-Examination by Mr. McNally.

Q. You said that the meaning you referred to in your direct examination referred to directly and not indirectly applicable to the work, the disputed phrase?

A. Right, sir.

Q. Do you consider the Indiana Gross Income Tax indirectly applicable to the work?

A. As such, no.

Q. Why did you make the distinction, directly and indirectly?

A. Well, you have—the Indiana Gross Income Tax is indirectly in the fee that you pay. If the contractor 368 does not put it and include it in his fee, that is his problem.

Q. Oh, I see; now I get the purport of what you are talking about. In other words, you have in mind that the contractor some other way gets back the Indiana Gross Income Tax by including it in some other charge?

A. In his overhead.

Q. In his overhead?

A. Right, sir.

Q. Now, with that view, I take it then that I interpreted your direct testimony properly, that you consider the Indiana Gross Income Tax as indirectly applicable to the work; is that correct?

A. No, it is not applicable to the work, as such.

Q. Well, is it indirectly applicable?

A. No, it is not measured on the work itself.

Q. What did you mean when you used the word "indirectly"?

A. Well, from the standpoint of taxes?

Q. You used the word in your direct examination.

A. Well—

Q. You said that this clause meant taxes directly applicable to the work, and not indirectly applicable
369 to the work. Now I am asking you, is the Indiana Gross Income Tax indirectly applicable to the work?

A. I don't think so.

Q. Well, why did you make the distinction on your direct examination?

A. Well, there are certain taxes which are indirectly applicable, as you well know, I am quite sure, from the standpoint that they are figured as a part of the overhead and must be paid, and therefore are included, so indirectly—

Q. Outside of the question whether they are included in overhead, or not, isn't it your opinion that the Indiana Gross Income Tax is indirectly applicable to any work?

A. No, sir, not indirectly applicable to the work

Q. Indirectly applicable to what, if not the work, the contract?

A. The Indiana Gross Income Tax would have to be paid.

Q. You are not answering my question, I submit, Mr. Schotters.

A. Well, it is not directly or indirectly applicable or measured by the work itself.

Q. Do you want to withdraw that distinction that
370 you made on your direct testimony about directly and not indirectly?

A. Well, I would have to review the tax statute to see if there are any indirect taxes that are applicable.

Q. Well, you did say, didn't you, even under my cross-examination, that the Indiana Gross Income taxes are included in the overhead?

A. Right.

Q. Now, if they are included in the overhead, aren't they then, under your conception, indirectly applicable to the work done under the contract?

A. The applicability of the work—

Q. Can you answer the question? I am afraid this may go on and on.

A. No, I would have to say no to you, sir.

Q. And you do not care to change any of your previous testimony, despite your answer no to this; is that correct?

A. That's right.

Q. Now you have charge of all construction contracts of Indianapolis Power & Light Company?

A. The preparation and the review and approval of them, yes, sir; under my supervision.

371 Q. You prepare the contracts?

A. I would say we prepare seventy-per cent of them, yes, sir. Some we take in the form in which they are submitted.

Q. You used the word "repair" contracts initially on your direct examination.

A. Repair?

Q. He asked the question; repair construction; do you do repair construction?

A. He meant prepare.

Q. Oh, I beg your pardon. Your seventy per cent covers all types of construction contracts?

A. From the standpoint of preparation?

Q. Yes.

A. Yes, sir.

Q. In these contracts, under net cost contracts, do you use the clause that is involved in this case, that was read to you before, 15(h)?

A. This one here?

Q. Under the costs of the contractor, do you use that clause in your contracts?

A. I do not, sir.

Q. In view of your direct testimony, I presume as sort of an expert, do you know of any Indiana taxes, State of Indiana taxes, that that would cover, other than Indi-
372 ana Gross Income Tax?

A. At the time that contract was written, or with the tax clause which I use—

Mr. McNally: I am asking you a direct question.

Will the court reporter please read it?

(Question read.)

Mr. McNally: Do you understand my question?

The Witness: Yes, sir.

A. I wouldn't say it covered the Indiana Gross Income Tax, sir.

The Court: No. He says, what does it cover? That's really what he is getting at. What kind of conceivable tax of the State of Indiana would the contractee agree to pay to the contractor, what kind of tax is in mind when that phrase is used?

The Witness: That I think, your Honor, in all due equity, is from the standpoint of future taxes. It takes two and one-half to three years to build a power generating station, sometimes four years, and I think the in-
373 tent and purpose of a clause of that type, at least the intent that I have given and placed on ours, in discussions that I have had, is that it takes care that if and in the event, and you normally have one or two legislatures intervening—

Mr. McNally: I move to strike that, because—

The Court: Well, wait until he gets done.

The Witness: —one or two legislatures intervening, and one never knows what tax questions might arise or what tax laws might be passed by a legislature, and therefore any future or state taxes, that are applicable to the work by virtue of that law I think would come under that section.

The Court: But you don't know of any present or past Indiana tax that the contractee might have to assume by virtue of that phraseology?

The Witness: No, sir.

Mr. McNally: I move that his previous answers be stricken.

374 The Court: Well, overruled.

By Mr. McNally:

Q. Will you look at that clause again, 15(h) of the contracts in issue, and see whether there is any reference to the word "future" or any word that means in the future, or anticipating any laws that may be passed in the future?

A. No, that is strictly in the present.

Q. Now, when you said that these words have a meaning in the trade, did you predicate your testimony to that effect upon your experience in reviewing the contracts for the Indianapolis Power & Light Company?

A. Not one hundred per cent, no, sir.

Q. Well, tell me what per cent on your experience reviewing your company's contracts and what percentage is otherwise, or approximately; I know you said it loosely.

A. I don't review the contracts for the other utilities. I have asked for copies of their contracts and have reviewed them, merely as a matter of information only, sir.

Q. Have you predicated your statement as to the meaning given to the words that you were asked about on
375 direct examination on your experience in reviewing contracts for your company and examining contracts of other utility companies?

A. I would say on both mine and the company whom I represent as well as other contracts that I have reviewed, from the standpoint of other utilities, and discussions with other utilities.

Q. And discussions?

A. Right, sir.

Q. That comprises—you have covered all on which you base, everything on which you base your statement of the accepted meaning in the trade of these disputed words, is that correct, the discussions, your examination of contracts of other utilities, and your review and study of contracts of construction of your own company; have I covered it all now?

A. Well, reading certain cases with respect to the meaning of the words "applicable to the work" in years gone by.

Q. You mean decisions rendered by courts of review?

A. That's right.

Q. And that is a fourth element upon which you base it?

A. That's right.

376 Q. Were those State of Indiana decisions?

A. Well, it has been some time since I reviewed the decisions, sir.

Q. Are you a lawyer, Mr. Schotters?

A. I am, sir.

Q. Now, have we covered everything upon which you base your statement?

A. I think generally, yes, sir.

Q. Now, the discussions that you had with other utility officials, they were among those utility officials and yourself, no one else present; is that correct?

A. No contractors present.

Q. And the result of those discussions was that you and the other utility officials or employees believed or came to the conclusion that the Contractor ought to pay the Indiana Gross Income Tax; is that correct?

A. Yes, sir, as an overhead.

Mr. McNally: That is all.

Redirect Examination by Mr. Friedrich.

377 Q. I think counsel asked you, you are a lawyer, too?

A. Yes, sir.

Mr. Friedrich: That is all, Mr. Schotters.

Mr. McNally: I now move, as I did as to Mr. Mitchell, that Mr. Schotters' testimony as to what the connotation or meaning in the trade was of the disputed words be stricken. On cross-examination he showed clearly that he wasn't qualified, and so testified.

The Court: Motion overruled, with the same thoughts in mind as when I ruled formerly on this same kind of motion.

(And thereupon the witness was excused.)

The Court: It is twelve fifteen. Do you want to go on?

Mr. Friedrich: We have one more witness here; he is up from Muncie, and he wants to go away on a vacation. I don't think it will take very long.

Mr. Cutler, will you be sworn, please?

378 BYRON H. CUTLER, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Friedrich.

Q. What is your name?

A. Byron H. Cutler.

Q. Where do you live?

A. 907 North Street, Muncie, Indiana.

Q. What is your business or occupation?

A. Contractor, doing mostly electrical work in the electrical industry, for utility companies in the Midwest.

Q. How long have you been engaged in this business?

A. Well, sir, in Indiana from 1948 until the present moment, I was with the Muncie Construction Company as vice-president. Previous to that time, I was with a contractor in Chicago, from 1930 until 1948, as chief estimator.

Q. The employer in Chicago was who?

A. The L. E. Myers Company.

Q. Did this company in Chicago that you mentioned do similar work, was it engaged in similar business as you have described the Muncie Construction Company 379 to be in?

A. Yes, it is the same.

Q. Did it also do work in the State of Indiana?

A. That's right, in the State of Indiana, and most of the other states of the Midwest.

Q. Now, as vice-president of the company doing this work, this contracting work, have you had occasion, or do you have occasion, to review the construction contracts on which your company performs construction work?

A. Well, I sign all of the contracts; I make most of the proposals, and review all of the proposals that we make to our clients.

Q. Are you familiar with the Indiana Gross Income Tax law?

A. I am, sir.

Q. And in reviewing and working with the contracts as you have done, as you have described, have you taken into consideration the Indiana Gross Income Tax law?

Mr. McNally: I object to that, as immaterial.

The Court: I think I will sustain it.

380 Mr. Friedrich: I think it qualifies him under the questions I am going to ask him, whether he takes that problem into consideration in his contracts and in reviewing the contracts. He is a contractor; he is a builder.

The Court: I will permit him to answer.

Read the question.

(Question read.)

A. Yes, we take—

The Court: You have answered it, if you take it into consideration.

The Witness: Yes.

By Mr. Friedrich:

Q. I show you here a contract between the parties to this litigation covering the erection of the generating station over at Michigan City, Indiana, and I direct your particular attention to Section 15 of this contract, where net cost is defined, and then to Section (h), which reads as follows:

"Amount required by any Federal, State, or local taxes applicable to the work, including old age benefit and unemployment taxes."

Does this language that I have just read in Section 381 (h), particularly that part where it says "taxes applicable to the work," have a connotation in the trade in Indiana, that is, the construction trade, in work of that kind?

Mr. McNally: I object to that. He is not qualified.

The Court: Well, I will overrule the objection. It goes to the weight.

A. Well, I have seen this phrase—

Mr. McNally: I object to the start of the question, as not responsive.

Mr. Friedrich: I think the question calls for yes or no, does it or doesn't it.

A. Yes.

By Mr. Friedrich:

Q. Then what is that connotation or meaning in the State of Indiana?

Mr. McNally: I object, on the same grounds as urged to all similar questions.

The Court: Same ruling.

A continuing objection may be shown.

The Witness: What was the question?

(Question read.)

A. That taxes such as taxes on material that the 382 contractor might buy for the project would be included; and any other such direct taxes as might be imposed during the progress of the work, or might be in the statutes of the State.

Mr. McNally: I move that the answer be stricken, on the same grounds as previously urged.

The Court: Overruled.

By Mr. Friedrich:

Q. Under the meaning or connotation put upon those words by the trade, is the Indiana Gross Income Tax considered a tax applicable to the work?

Mr. McNally: Same objection.

The Court: Overruled.

A. We have never considered the Indiana Gross Income Tax applicable to the work.

Mr. McNally: I move that that be stricken as wholly irrelevant.

The Court: Who do you mean by "we"? Is that your company, or is that recognized—

The Witness: My company and my associates that I have been connected with over the years since 1930.

The Court: Next question.

383 By Mr. Friedrich:

Q. Now, your company, the Muncie Construction Company, it operates in different states, doesn't it?

A. Yes.

Q. How much work do you do?

A. In volume?

Q. Well, yes.

A. Oh, about two and a half million dollars worth yearly.

Q. Did I understand you to say that you also prepare for your company, and have all through the years, also for the other company in Illinois, the Myers Company, The L. E. Myers Company, prepared, the bids and proposals to do work; is that part of your job?

A. I was chief estimator for The L. E. Myers Company, and as such prepared most of the proposals, although I did not sign contracts.

Q. Well, now for the Muncie company, you sign the contracts as vice president, but do you also there make the estimates and proposals and bids?

A. I have made the majority of the proposals myself, although at times I have delegated that to other individuals.

Q. This further question: The contract here that 384 I showed you is a lump sum contract. There might be cost-plus contracts and fixed fee contracts. Under any of those different forms of contract, as far as the Indiana Gross Income Tax is concerned, is it recognized as a tax applicable to the work?

Mr. McNally: Same objection, on the same grounds previously raised.

The Court: Overruled.

A. No.

By Mr. Friedrich:

Q. So that it makes no difference what particular type the contract is with reference to the payment or nonpayment or the inclusion or exclusion of the Indiana Gross Income Tax?

A. That's right.

Mr. Friedrich: You may cross-examine.

Cross-Examination by Mr. McNally.

Q. Mr. Cutler, look at Section 15(h), which counsel for the defendant showed you on your direct examination: "Amounts required by any Federal, State or local taxes applicable to the work, including old age benefits and unemployment taxes".

385 Did you understand that that was included in the cost that the contractor was to receive for his work under the jobs that are involved in this case?

Did you, or didn't you?

The Witness: State the question again.

Mr. McNally: Will you read it?

(Question read.)

A. I did.

Q. Is that clause used by you, your company, the Muncie Company, in any of its contracts?

A. No, sir, but I have seen it—

Q. No. Answer the question.

A. No, sir.

Q. Was that clause used by the company you worked for in Chicago?

Do you understand the question?

A. I understand it, but I will say this, that—

Q. No; was it, or wasn't it.

A. No, it was not.

Q. All of the work of your employer, construction work of the Muncie Construction Company, is for public utility companies, is it not?

A. That's right.

Q. And it has been since 1948?

386 A. Before that.

Q. Before that; always. Do any utility companies own stock in the Muncie Construction Company?

A. They do not.

Q. The Myers Company, all of its work, as you said, was for electrical industries or public utilities; is that correct?

A. That is correct.

Q. When were you asked to testify as a witness in this case?

A. Mr. Anderson asked me to testify several weeks ago.

Q. Have you known Mr. Anderson very long?

A. Just since—I met him at the time he asked me to testify.

Q. Where did that occur?

A. Where?

Q. Where did that occur?

A. In Muncie, Indiana.

Q. Was he down there on some other business?

A. I couldn't tell; I don't know.

Q. Who introduced you to him?

A. Mr. M. G. Gilbert, my partner.

Q. In the Muncie Construction Company?

387 A. That's right.

Q. Prior to this occasion, have you ever testified

before that the words "applicable to the work" do not include Indiana Gross Income Tax?

A. No, sir.

Q. Did you ever tell anybody before you testified that the words "applicable to the work" do not include Indiana Gross Income Taxes?

A. Yes, sir.

Q. To whom did you tell it?

A. To my engineers, that did the work under my direction.

Q. Well, you don't have contracts with this language in them, do you?

A. I tried to tell you a while ago that in most of the contracts that we sign—most of the contracts that we sign are made up by clients; we make our proposals; our proposals are included as a part of a contract which is made up by the client.

Q. Well, in other words, then, the contracts are submitted by the utility companies to Muncie and you sign them; is that correct?

A. After we make our proposal, yes sir.

Q. You sign what the utility companies have pre-
388 pared, and that becomes a contract?

A. That's right.

Q. Is that correct?

A. That is correct.

Q. And none of these contracts, you have testified, includes this disputed clause in this case; is that correct?

A. That is not correct.

Q. Well, I must have misunderstood you, then.

A. Well, I think you did. I think a question to me that you made asked if I ever used that phrase in any contracts that I prepared, and I said no.

Q. Well, I intended to include any that you signed. Now, what did you sign with that phrase in there?

A. I have signed several; I don't know how many.

Q. When was the last one, and with whom?

A. I don't remember the last one.

Q. When was the second to the last one, and with whom?

A. I can't say as to that. I don't know the order in which they came up without referring to my notes in the office.

Q. Well, didn't you know what you were going to testify to today?

389 A. I did.

Q. You went over that with Mr. Anderson, I presume, did you not?

A. I did.

Q. Have you predicated your statement as to the meaning in the trade of "taxes applicable to the work" upon your experience with the contracts entered into by your company, Muncie Construction Company, and in your previous employment with the Myers Company in Chicago?

The Witness: Would you read that question?

(Question read.)

The Court: In other words, is your testimony based on that experience?

A. That's right.

By Mr. McNally:

Q. Do you know of any other tax, other than the Indiana Gross Income Tax, that would come within the meaning of the phrase that you have read now twice since you have been on the stand that is in the contracts involved in this case?

A. Well, you mean the tax that might be applicable to the work?

390 Q. What was meant by state taxes applicable to the work, what taxes could have been included?

A. Well, Indiana unemployment.

Q. That is specified, "unemployment".

A. Federal excise tax.

Q. That's a federal tax. I am talking about state.

A. Old age benefit. I think that's a federal tax, too.

Q. That is mentioned.

A. And I think it would include—

Q. Just state tax, what state tax?

A. Local taxes would be included there.

Q. What local taxes?

A. Well, there might be a municipal tax.

Q. On what?

A. If the plant was located in a municipality, there may be a municipal tax. That might be included.

Q. Well, do you think that the word "state" tax includes a municipal tax?

A. No.

Q. What state tax, Mr. Cutler?

A. Well, any state tax that might be—

Q. Do you know of any state tax, not any that 391 might be; do you know of any?

A. No, I don't believe I do.

Q. When I said any state tax, I meant to exclude, of course, the Indiana Gross Income Tax, you understood it that way, didn't you?

A. That's right.

Mr. McNally: That is all.

Redirect Examination by Mr. Friedrich.

Q. Mr. Cutler, have you ever seen in any of the construction contracts clauses identical with or substantially the same as Section 15(h) that has been referred to and shown you here?

A. I have seen it, but I—

Mr. McNally: I object to it, as immaterial, in line with my position in the record.

The Court: Overruled.

Mr. Friedrich: Well, the reason I wanted to question him about it, you broke him off when he said he had seen it. I was going to find out a little bit more about it. Then you limited it to the last and the next to the
392 last. If you had gone up the scale, maybe he would have remembered it. That is the reason for it, just to clear up that answer.

The Court: Go ahead.

By Mr. Friedrich:

Q. Have you seen a clause in contracts that is like Section 15(h) that was read to you?

A. I have.

Q. And have such clauses been in contracts that you on behalf of the Muncie Construction Company signed?

A. No, sir, I haven't signed such a contract. I have bid on work where that clause was in the specifications.

Mr. McNally: I move that the answer be stricken. It is not responsive, and totally immaterial.

The Court: Overruled.

By Mr. Friedrich:

Q. Then it is a fact that you have been familiar with that clause, or seen that clause?

A. I have.

Q. Over what period of time?

393 Mr. McNally: I object. It is leading and suggestive.

The Court: Well, overruled.

A. Since 1930.

Mr. Friedrich: That is all, Mr. Cutler.

Recross Examination by Mr. McNally.

Q. You have seen it, Mr. Cutler, but can't recall it; right?

A. I can't remember all of the contracts that went through my hands, or proposals.

Mr. McNally: That is all.

The Court: Are you through?

Mr. Friedrich: Yes.

The Court: I would like to ask a couple of questions.

Without any specific term in a contract having to do with who is to pay the gross income tax, what is the general custom between contractors and contractees as to who pays the gross income tax?

The Witness: Well, in my experience, the 394 contractor is usually liable for the Indiana Gross Income Tax.

The Court: Now, getting down to these words that are used in this contract or in these contracts that you have been talking about, in the first place, have you had experience with, not job contracts, but cost-plus or fixed fee contracts?

The Witness: Yes, I have.

The Court: You bid, have bid, on those?

The Witness: I have.

The Court: And you have signed and performed contracts of those kinds?

The Witness: We have, to a lesser degree. Most of our contracts are lump sum.

The Court: What I am trying to get at is, have you had experience personally, either in your own business, or have you had discussions—we will take it up separately:

First, have you had experience in your own work, either with the Myers Company or with your present company,

with contracts which are either cost-plus or fixed fee contracts, as distinguished from general job con-
395 tracts, in which these specific words were used, and I will read them:

"Amounts required by any Federal, State or local taxes applicable to the work, including old age benefit and unemployment taxes."

That is the question, and I will have Mrs. Bretsch read it.

(Question read.)

The Witness: Yes.

The Court: You have had?

The Witness: Yes.

The Court: What has been the interpretation given to those words, as to who pays the gross income tax?

The Witness: Well, that the contractor would pay the Indiana Gross Income Tax.

I can tell you the last job that I bid on, where we anticipated paying the Indiana gross, but we didn't get the job.

The Court: Now, then, going to other than your own experience, I believe you said that your testimony was limited to your own experience, you haven't discussed
396 this with contractors?

The Witness: Only with my former employer, when I worked with him.

The Court: Those are the only questions I have. If either counsel have any questions that you wish to base on my questions, you may ask them.

Mr. McNally: For the purpose of the record, I want to object. I didn't think it would be respectful to be doing it while your Honor was asking the questions.

The Court: I want you to go ahead on it.

Mr. McNally: I object to the questions, and move that the answers be stricken, upon the ground that the testimony is immaterial to the case.

Now, without—

The Court: I understand your position.

Mr. McNally: Now, without waiving that objection, I have a question.

Recross Examination by Mr. McNally.

Q. Mr. Cutler, you have said, as I understood your answers to the Judge's questions, that you have had
397 experience with contracts with identical language to that contained in this contract, which language has been read to you.

Is that correct?

A. That's right.

Q. Where are those contracts?

A. The one, the last one that I had reference to when I answered the question was a contract or an inquiry that we received from a client, on which we quoted, but did not get the job, and that proposal that we submitted on the inquiry where that phrase was used is in my files.

Q. Well, you don't know whether or not the contractor was reimbursed. All you know is that such a phrase was in a contract and a proposal on which you bid; is that right?

Is that correct?

A. That's the last one that I recall.

Q. And you don't want to infer that your knowledge went beyond that. All you have done, you have seen such a clause in a construction contract; is that correct?

A. Yes; in several.

398 Q. In several. Now, on those contracts, was the circumstance the same, that you had seen the proposal with such language, you made a bid, and you weren't the low bidder and didn't get the job; is that correct?

A. As far as Muncie Construction Company was concerned.

Q. You didn't get the job.

A. As far as my former employer was concerned, they had received jobs, received contracts, and entered into the contract on jobs where a similar phrase was used. It might have been that the words were twisted to some extent, but the intent was there.

Q. Well, I think it is clear, but I want to be certain. As to Muncie, your experience with Muncie Construction Company, the answer is no.

Now, you say as to your previous experience prior to 1948 with this Myers Company in Chicago, you had seen similar language, the words might have been somewhat distorted or changed around; is that correct?

A. Yes, but the intent was the same.

Mr. McNally: I move that the volunteer statement, "the intent was the same," be stricken.

399 Mr. Friedrich: No, that is part of your question.

Mr. McNally: He is interpreting the language himself.

Mr. Friedrich: It is in response to the question you asked.

The Court: Now, wait. It goes to weight. I will overrule the motion.

Mr. McNally: Well, let's pursue it.

By Mr. McNally:

Q. What was the contract or contracts that the Myers Company entered into with this language, or language of the same intent?

A. Specific contracts?

Q. Yes. Give me the date, and with whom.

A. Well, I can't give that information. I don't know it at the present time. But I do know—

Q. That's all; that's all on that.

Now, you don't know either, then, whether they were contracts to be performed in states where there was a state gross income tax, do you?

A. Yes.

Q. What?

A. Yes, I do.

Q. What states were they in?

400 A. They were in Indiana.

Q. All Indiana contracts that Myers had with this clause, or clause of the same intent?

A. No, sir. They were in other states, but I can't remember the specific—

Q. What was the contract in Indiana, how far back; does it go way back, is that why you can't recall it?

A. That's right.

Q. When did you start to work for Myers?

A. 1930.

Q. Was the contract back around that time, is that why you can't recall it?

A. It was between 1933 and the time I left, in 1948.

Q. Were there any prior to 1933?

A. I don't recall.

Q. You went to work in 1930?

A. That's right.

Q. These contracts may have been between 1930 and, we will say, 1934?

A. Or since.

Q. And that's why you can't remember them; is that correct?

A. Or since.

401 Q. You don't remember any since, do you?

A. Not specifically.

Mr. McNally: That's all.

Mr. Friedrich: That's all, Mr. Cutler.

(And thereupon the witness was excused.)

Mr. Friedrich: I think that will conclude our evidence, your Honor.

The only thing I was thinking of, it has been suggested that the contracts sued on—

Mr. McNally: I have a motion—

The Court: Now, wait; I can't hear you both at the same time.

Go ahead, Mr. Friedrich.

Mr. Friedrich: Did you have something more, Mr. McNally?

Mr. McNally: I want to make a motion on his testimony.

The Court: All right.

Mr. Friedrich: Go ahead.

Mr. McNally: I move that all of his testimony concerning construction of the words be excluded, for the reasons previously urged.

402 The Court: Well, objection overruled, with the same comment on it.

Mr. McNally: Now, if you have rested, I have some rebuttal.

Mr. Friedrich: Well, I haven't—I was just getting ready to make a statement.

Mr. McNally: I—

The Court: Now, wait. Before you make the statement, I have got this inquiry to make:

If we are going to go into an afternoon session, that's one thing; we might as well quit for the noon hour; it is getting pretty late. On the other hand, if we are going to wind it up without any further evidence today, or any evidence at all, if this ends the evidence, then I think we could take five or ten minutes to get everything closed up, instead of everybody coming back this afternoon to have a ten minute session, so I want to have a preliminary inquiry as to whether or not we have to have an afternoon session.

Mr. Friedrich: If you want me to indicate, we can rest. There was one observation I was going to make.

403 It will be up to Mr. McNally.

The Court: Do you have any rebuttal for this afternoon?

Mr. McNally: No, just some letters that I can introduce in a second.

The Court: Well, will you have any other rebuttal?

Mr. McNally: No. Subject to this other thing; I want to consider that.

I don't think I am going to have any. If I have the record—

The Court: Well, first I will find out—I perhaps ruled without getting an observation from counsel for the defendant—is there any reason why he shouldn't be given an opportunity beyond today to bring in any counter-evidence?

I presume there was no notice that this was going to be a defense.

Mr. McNally: None at all.

Mr. Friedrich: Well, your Honor, we didn't have to give a notice; we didn't have to plead it.

If the man feels that he should have a day, I have no objection to it.

404 The Court: All right. Well, that answers the question.

I am not ruling that you should have given notice.

Mr. Friedrich: All right. We didn't have to.

Mr. McNally: My present feeling is that there is no necessity of putting on any rebuttal evidence.

The Court: I will let you reserve, however, that question.

Mr. Friedrich: I don't think that Mr. McNally has formally introduced in evidence the contracts that are sued on, and I think the record should be that the contracts are in, should be in.

The Court: Was that what you were going to say?

Mr. Friedrich: That's what I was going to say before. I am told by counsel here—

The Court: A photostatic copy is connected with the complaint.

405 Mr. Friedrich: If Mr. McNally is satisfied with that, I am.

Mr. Anderson: Well, with the understanding that they are in evidence.

The Court: Well, in evidence in the form of an exhibit to the complaint; is that agreeable?

Mr. McNally: Yes.

The Court: All right.

Now, you rest?

Mr. Friedrich: We rest.

And thereupon the plaintiff, to support and maintain the issues in its behalf, introduced the following evidence in rebuttal:

(Instruments were marked Plaintiff's Exhibits 17, 18, and 19, for identification.)

Mr. McNally: I wish to state that the purpose of the letters is not to bind the defendant by what I said was the law, or binding upon us by what they said was the law, but to show that there was never any contention that Herlihy Mid-Continent Company had released this Indiana Gross Income Tax payment.

406 Mr. Friedrich: I think some of these are already in evidence.

The Court: Why don't you look at them? Maybe if we would take a minute without talking we would get along faster.

Mr. Friedrich: We have no objection. I think some are already in.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 17, 18, and 19 were admitted in evidence.)

Mr. McNally: I will close with this one statement:

During the course of the trial, I referred to Extra Order on the Contract 851. I did that incorrectly, and the gentlemen on the other side were kind enough to point it out to me. That was extra work under Contract 851.

The Court: You want the record to show that?

Mr. McNally: To be corrected in that regard.

We rest, subject to that other qualification.

The Court: Yes. How soon will you determine that?

407 Mr. McNally: I would say within a day or two.

The Court: By Monday? Will you let me know and Mr. Friedrich know by Monday?

Mr. McNally: Yes, sir.

The Court: By telephone, as to whether or not you have any further evidence.

Mr. McNally: All right.

The Court: You rest, then, subject to that?

Mr. McNally: Yes, your Honor.

Mr. Friedrich: Well, on that, today is Wednesday; could the time be shortened before Monday? I am just thinking of some things that I have. There will be Thursday and Friday. Do you need that long?

Mr. McNally: I thought I might want to look at the record. Well, I can do it quicker than that. I have pretty accurate notes on the testimony. I can let you know by Friday.

The Court: I won't be available.

Mr. Friedrich: No, but he can call me, your Honor, so I will know whether I have to—

408 The Court: You let Mr. Friedrich know. You are going to let him know one way or the other?

Mr. McNally: Yes.

The Court: Now, I don't want to adjourn court, but I am going to release Mrs. Bretsch; she need not take this, unless you gentlemen want her to.

I would like to discuss with you, on the assumption that the case has been closed, how we shall proceed, as to briefs and/or argument. Unless you want it on the record—I will leave that to you to decide.

Mr. Friedrich: I see no necessity.

Mr. McNally: No, your Honor.

The Court: All right.

409 And on the 9th day of March, 1956, at 10 o'clock A. M., the trial of said cause was resumed, pursuant to adjournment.

Present:

The same as before.

The Court: You may proceed.

And thereupon the plaintiff, to support and maintain the issues in its behalf, introduced the following further evidence in rebuttal:

JAMES MORRISON, a witness on behalf of the plaintiff in rebuttal, having first been duly sworn, testified as follows:

Direct Examination by Mr. McNally.

Q. Will you state your name, please?

A. James Morrison.

Q. Where do you live, Mr. Morrison?

A. 7119 Crandon Avenue, Chicago.

Q. What is your business?

A. Construction business.

Q. How long have you been in the construction business?

A. Thirty years, for myself.

410 Q. Prior to that, were you in the construction business?

A. Yes, sir.

Q. Where is your principal place of business?

A. 1834 Summer Street, Hammond.

Q. Indiana?

A. Yes, sir.

Q. How long have you been in the construction business in Hammond, Indiana?

A. Thirty-two years.

Q. Have you done construction work as a contractor in the State of Indiana and other states?

A. Yes, sir.

Q. Have you done much work in the State of Indiana during the past thirty years?

A. Yes, sir.

Q. Have you done construction work as a contractor for public utilities and other owners of industrial plants, and so on?

A. Yes, sir.

Q. Will you name some, just a few, of the larger construction jobs that you did as a contractor in the State of Indiana?

A. Standard Oil Company, Cities Service, Sinclair, Shell, Socony, American Steel Foundries, American
411 Standard, Union Carbide, Linde.

Q. That is enough.

Are you, and have you been, during, since, and prior to 1948, familiar with the customs and usages and the accepted meanings of terms in the construction industry or trade in the northern part of the State of Indiana, and in the State of Indiana generally?

A. Yes, sir.

Q. During, since, and prior to 1948, in the State of Indiana, including the northern part of that state, in the construction industry or trade, in construction work for public utility companies, or others, has the phrase "any state taxes applicable to the work" an accepted meaning to the effect that the State of Indiana Gross Income Tax is not included in such phrase?

A. No, sir.

Q. During, since, and prior to 1948, in the State of Indiana, including the northern part of that state, has it been usual and customary in the construction industry, in

construction work done for public utility companies, or others, that a contractor is not paid by the owner for whom the work is done the State of Indiana Gross Income Tax on the moneys the contractor receives from the owner for
412 the net cost of the work where the contractor is paid on fixed fee plus costs, or costs-plus basis?

Mr. Friedrich: We object to the last question, your Honor. It calls for a custom and usage, which is not now in issue in the case.

The first question, about the words, if they have a definite meaning in the trade, that simply rebuts ours, but I think the latter question is objectionable as proving something that is not within the issues in the case.

The Court: Before you respond, Mr. McNally, I would like to ask whether or not you dismissed part of your case which was founded on this very kind of question.

Mr. McNally: I did, but this is rebuttal to Mr. Cutler's testimony, particularly under questions that your Honor asked.

You asked him, substantially, whether there was any difference whether the bid was firm or whether it was fixed fee plus costs, or costs-plus, and then he said that it was usual and customary under either type of contract that
413 the contractor was not paid the Indiana Gross Income Tax as part of his costs.

The only purpose of this question and the answer sought to be elicited is to refute what Mr. Cutler testified to.

The Court: Well, it was my impression that as to the evidence that was elicited under any questions put by counsel or by the Court, at least the intention was to expire the proposition that these words had a definite meaning within the community, and not as to the use and custom of how contracts were entered into or what the practice was, even if there wasn't a formal contract, as to who would pay the tax, or whether this tax was one of the taxes that the con-

tractor would pay, so I am wondering if we aren't touching upon an issue that is no longer in the case.

Mr. McNally: As I said before, it is only introduced, by this rebuttal, for the purpose of rebutting what Mr. Cutler testified to.

The Court: Well, on that point, what do you have to say, Mr. Friedrich?

414 Mr. Friedrich: Just as I stated in my objection, as I remember Mr. Cutler's testimony, it related to the words "taxes applicable to the work." The question that counsel now puts to the witness goes way beyond that. This question, if I understand it correctly, is on an issue that is not in the case. He has covered, with Mr. Morrison, the point that Mr. Cutler raised. Mr. Cutler says, "Yes, the tax isn't included." Mr. Morrison says, "Yes, it is included," in answer to the previous question. Now he is going far afield. I think it is on an issue that is out of the case; I think it is on custom and usage, and that we no longer have here.

The Court: Well, I think I am ready to rule. I will say this, it has been my understanding all of the way through, and I think it is conceded by counsel, that that issue of custom and usage is not an issue any longer in the case, and if there were some evidence on that issue by Mr. Cutler, it certainly is not pertinent to the present
415 issues; and it seems to me that to rebut evidence which ought not to be in the record, if it is in, or which at least cannot be considered, we are pursuing a false issue to its ultimate conclusion on your premise; so I am going to sustain the objection.

Mr. McNally: That is all.

Mr. Friedrich: No cross-examination.

The Court: If you have nothing further, I would like to ask Mr. Morrison:

You say that these particular words, when they appear in a contract, have a definite meaning among contractors?

The Witness: What words, might I ask, Judge?

The Court: Well, let's get the words.

Mr. McNally: Any state taxes applicable to the work.

The Court: Will you get them?

Mr. McNally: Paragraph 15 of the first contract, and of the other two.

Mr. Friedrich: "Taxes applicable to the work,"
416 Section 15(h) under the original contract.

The Court: I will get it.

Mr. McNally: They asked it as to the phrase, any St. e taxes applicable to the work. That was their expert testimony.

The Court: This contract reads in part:

"It is mutually agreed"—that is, the contract in issue—"It is mutually agreed that the 'Net Cost' of the Work shall include all expenses incurred by Contractor which are directly chargeable to the Work, and that said Net Cost of the Work shall, without restricting the generality of the foregoing, include the following items:

"(h) Amounts required by any Federal, State or local taxes applicable to the Work, including old age benefit and unemployment taxes."

The question is, when those words that I have read appear in a contract in this community, do these words have a significant interpretation with regard to what taxes are meant, whether they mean gross income taxes?

417 The Witness: Yes, sir, they do.

The Court: What do they mean?

The Witness: They mean that the amount spent in gross income tax by the contractor is reimbursible as a state tax. I have a Government contract in mind, the language is very similar, and we were paid the Indiana Gross on it, with it.

The Court: Well, you see there is a difference between what is the customary thing in these contracts and whether

or not these particular words mean what you say they mean.

Do you have in mind that contracts reading this way are interpreted by the people who make the contracts in such a way as to require the person who is getting the work done to pay the gross income tax?

The Witness: Definitely, under a cost-plus contract.

The Court: I will permit any further questions that either party has to ask.

Mr. McNally: I have nothing further.

Mr. Friedrich: We don't have anything further.

418 (And thereupon the witness was excused.)

Mr. McNally: That is the end of our rebuttal.

The Court: Do you rest?

Mr. McNally: Yes.

Mr. Friedrich: We have no further evidence, your Honor.

The Court: The record may show, then, that both parties rest.

I realize that this time question was altered, as far as argument. I don't want to press you on it, unless you are prepared, but it is a convenient time for me to hear you, if you want to go forward.

Mr. McNally: I am prepared.

The Court: Are you prepared, Mr. Friedrich?

Mr. Friedrich: Yes, if you want to go ahead.

The Court: Do you have any idea as to time?

Mr. McNally: You fixed the last time an hour. The

419 plaintiff should have a chance to reply.

The Court: That's right.

Mr. McNally: What I don't take up of the hour, I would like to reserve—

The Court: Do you want any more than the total of an hour? You may have it. I have nothing else this afternoon.

Mr. McNally: I don't think I will need it, your Honor.

The Court: Well, if you run over, I will not restrict you.

Mr. McNally: I would like to say this to the Court, that I have a cold; I don't know how clear I am. My wife says I am not very clear. If I am not, I wish you would tell me.

The Court: If you want any recesses, I will adjourn.

One thing else I would like to ask, and that is this: You may, of course, have the arguments reported, taken down by the court reporter, or you can waive that; but, regardless of that, we are prepared to have them taken by tape,

and they will be taken by tape, because it is possible
420 that I might not be able to decide this case immediately; I hope that I can, but it might come about that I would not because of other things that intervene, and I would have the arguments then preserved.

Mr. McNally: I see no need for the court reporter taking it; do you?

Mr. Friedrich: No; the tape is sufficient.

201 THE UNITED STATES DISTRICT COURT.

(Caption—1446)

ORDER.

(Filed Aug. 17, 1956. Kenneth Lackey, Clerk.)

The determination of the motion to dismiss filed by the defendant on January 28, 1953, and heard on oral argument on March 30, 1955, having been deferred until the trial by order of this court entered April 12, 1955, and the court now being fully advised in the premises, the said motion is hereby denied.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
August 17, 1956.

202 THE UNITED STATES DISTRICT COURT.
(Caption—1446)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

(Filed Aug. 17, 1956. Kenneth Lackey, Clerk.)

The above entitled cause came on regularly for trial, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact.

1. The plaintiff is a corporation organized and existing under the laws of the State of Illinois, duly authorized to transact business in the State of Indiana, and is engaged in the general contracting business. The defendant is a public utility corporation organized and existing under the laws of the State of Indiana, and is engaged in the manufacture and distribution of electric power and gas. The amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

2. The plaintiff, Herlihy Mid-Continent Company, of Chicago, Illinois, and the defendant, Northern Indiana Public Service Company, of Hammond, Indiana, executed two written contracts, identified on their face as 203 K-814, dated August 13, 1948, and K-825, dated October 19, 1948, whereunder the plaintiff, as a general and independent contractor, agreed for fixed fees and its net costs, to perform and complete certain work and furnish all labor, materials, equipment, tools and supplies required therefor, in the construction of parts of the extension of the defendant's generating station on Lake Michigan, west of the harbor at Michigan City, Indiana. The plaintiff and the defendant executed a further contract, identified

on its face as K-851, which is dated October 27, 1948, whereunder plaintiff, for firm fixed unit prices, agreed to unload, erect and finish structural steel for the main building of said generating station.

3. The plaintiff satisfactorily performed and accomplished all the work required under its aforesaid contracts with the defendant in accordance with the terms and provisions thereof, and the plaintiff has been paid all monies it claimed due from the defendant, except the State of Indiana Gross Income Tax, upon the monies defendant paid plaintiff as "net cost" for expenses incurred by plaintiff in the performance of the work.

4. All of the aforedescribed contracts between plaintiff and defendant were prepared and drawn by Sargent & Lundy, an engineering firm employed by the defendant as its engineers for the construction of the aforesaid extension to defendant's generating station. The contracts were thereupon submitted to the plaintiff for execution.

204 5. The contract identified as K-814 contains the following provision:

> "(15) It is mutually agreed that the 'Net Cost' of the Work shall include all expenses incurred by Contractor which are directly chargeable to the Work, and that said Net Cost of the Work shall, without restricting the generality of the foregoing include the following items: • • •
>
> "(h) Amounts required by any Federal, State or local taxes applicable to the Work, including old age benefit and unemployment taxes • • •."

The contract identified as K-825 contains an identical provision.

The contract identified as K-851, which is a firm unit price contract, does not contain the aforequoted provision, and plaintiff seeks no recovery for State of Indiana Gross Income Tax under Contract K-851 for the unit prices paid by defendant; but plaintiff does seek recovery for the

Indiana Gross Income Tax upon monies paid plaintiff as cost for extra work done under the Extra Work provision of contract K-851. The provision of Contract K-851 providing for extra work requested by the defendant on a "Cost Plus" basis is as follows:

> "'Cost Plus' Basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is * * *."

6. After the execution of contract K-814 and the commencement by plaintiff of the work thereunder, the plaintiff sent to defendant invoices or bills, dated October 30, 1948, November 16, 1948 and November 30, 1948, respectively, for work performed by plaintiff up to such dates, each of which bills included for payment to the plaintiff as an item of its cost the State of Indiana Gross Income Tax applicable to the monies for which payment was requested by plaintiff in performing the work. Such bills, in accordance with the defendant's prescribed practice, were mailed by plaintiff to defendant at Michigan City, Indiana, the site of the work, where they were checked; and then forwarded by defendant to the office in Chicago, Illinois of Sargent & Lundy, defendant's engineers. At Sargent & Lundy's office the bills aforedescribed were checked and then certified for payment by Sargent & Lundy. Such certification included the State of Indiana Gross Income Tax as billed by plaintiff. These bills, so certified, were then mailed by Sargent & Lundy to defendant's principal office. In the purchasing department of the defendant that part of the aforesaid identified bills which pertained to the State of Indiana Gross Income Tax was stricken out in pen and ink. Thereafter the plaintiff, from

time to time, billed the defendant on separate vouchers or bills for the Indiana Gross Income Tax plaintiff was required to and which it did pay. Upon completion of the work under the contracts, plaintiff mailed defendant a voucher or bill summarizing all of the State of Indiana Gross Income taxes which plaintiff had been required to and did pay. The plaintiff never withdrew or waived its claim against the defendant for the payment of such taxes.

7. For some time prior to the time that plaintiff made its bids to do the "Work" provided for in the con-
206 tracts involved in this action and up to the time the contracts here in question were executed between plaintiff and defendant, the plaintiff, as a contractor, was having business dealing with the aforesaid firm of Sargent & Lundy, in that plaintiff was performing construction work in the State of Indiana for Chicago District Electric Generating Corporation, which was commonly called the "State-line" job. Sargent & Lundy were the engineers for the Chicago District Electric Generating Corporation on the "State-line" job acting in the same capacity as they did for the defendant in the construction of the aforedescribed extension to its generating station on Lake Michigan, near Michigan City, Indiana. On this "State-line" job, the plaintiff billed for and was paid as part of its costs the Indiana Gross Income Tax on all cost work.

8. Paragraph 19 of Contracts K-814 and K-825 enumerate the items of overhead which plaintiff therein agreed to furnish without charge other than the total fixed charge provided in paragraph 14. The Indiana Gross Income Tax is not included in items of overhead specified in paragraph 19.

9. The State of Indiana Gross Income taxes which the plaintiff seeks to recover in this trial are those that plain-

tiff paid upon the monies the defendant paid plaintiff as the "Net Costs" of the Work. The "Net Costs" are the expenses plaintiff actually incurred in performing the Work that are directly chargeable thereto. The defendant repaid the plaintiff these expenses and the plaintiff was required to pay the State of Indiana Gross Income
207 Tax in the amount of $31,529.55 on the monies plaintiff received from defendant in payment of such expenses.

10. At the time in question there was in full force and effect Regulation 404 of the official regulations promulgated by the Gross Income Tax Division of the State of Indiana, which regulation is as follows, to-wit:

> Reg. 404. Passing the Tax on.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a matter of contractual agreement between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts.
>
> Since taxpayers are not made the agents of the State to collect gross income tax, any amounts added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a part of the gross receipts of a taxpayer and must be reported as taxable income.

Conclusions of Law.

1. This court has jurisdiction of the parties and the subject matter on the basis of diversity of citizenship.

2. If there be any doubt or uncertainty concerning the written provisions of the contracts involved in this action as to whether the State of Indiana Gross Income Tax was included within the meaning of the word "taxes" which the plaintiff was to be paid as part of the cost of the Work,

the tax provisions must be construed most strongly against the defendant because the defendant, through its engineers, Sargent & Lundy, prepared the contracts and employed the words used concerning taxes.

208 3. The provision of paragraph 15(h) of Contracts K-814 and K-825 apply to all expenses incurred by plaintiff which were directly chargeable to the Work under those contracts and Extra Order No. 1 under Contract K-825.

4. The word "taxes" in the provision of Contract K-851 providing for payment to the plaintiff for extra work on a "Cost Plus" basis includes any taxes required to be paid by plaintiff on the monies defendant paid plaintiff as the cost of such extra work and does not include the percentage provided for and paid plaintiff for such extra work.

5. As the contracts in question provide that the defendant shall pay the expenses incurred by plaintiff that are directly chargeable to the Work, the defendant was to reimburse the plaintiff for such expenses. That construction which is most equitable should if possible be given to the disputed tax provisions of the contracts. It would be inequitable to construe the disputed tax provisions of the contracts so as to require the plaintiff to bear the obligation of the State of Indiana Gross Income Tax on monies which defendant paid plaintiff to reimburse plaintiff for expenses actually incurred in defendant's behalf.

6. The State of Indiana Gross Income taxes in the total amount of $31,529.55 which the plaintiff paid on monies received from the defendant as net costs for expenses incurred by plaintiff are State taxes applicable to the Work, and under the provisions of the contracts in question the plaintiff is entitled to payment from the defendant of
209 such State of Indiana Gross Income taxes as part of plaintiff's net costs of the Work.

7. The plaintiff is entitled to judgment against the defendant in the amount of $31,529.55 and plaintiff's costs of this action.

Judgment.

The above entitled action having come on for trial before this Court without a jury, the plaintiff appearing in person and by its attorneys, Nash, Ahern & McNally, and Martin J. McNally of Chicago, Illinois, and the defendant appearing in person and by its attorneys, Friedrich, Petrie and Tweedle, and Edwin H. Friedrich of Hammond, Indiana, and this Court having heard all of the evidence, testimony and proofs adduced upon the trial and having filed its Findings of Fact and Conclusions of Law with Order for judgment; Now, pursuant thereto it is hereby

Ordered, Adjudged and Decreed that the plaintiff, Herlihy Mid-Continent Company, have and recover judgment against the defendant, Northern Indiana Public Service Company, in the sum of Thirty-one Thousand Five Hundred Twenty-nine Dollars and Fifty-five Cents ($31,529.55), together with costs of this action to be taxed by the Clerk of this Court.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana.

210 THE UNITED STATES DISTRICT COURT.

* * (Caption—1446) * *

MOTION FOR NEW TRIAL.

(Filed Aug. 24, 1956. Kenneth Lackey, Clerk.)

The defendant moves the court to grant a new trial in this action for each and all of the following reasons and grounds, to-wit:

(1) The decision of the court is contrary to law.

(2) The decision of the court is not sustained by sufficient evidence.

(3) There is no evidence to sustain special findings of fact found by the court Numbered 6, 7, 8, 9 and 10. This specification challenges separately each of the above numbered findings of fact.

(4) Each of the conclusions of law are erroneous and this specification challenges each of the conclusions Numbered 1 to 7, both inclusive.

(5) There is no evidence to support the amount found due, namely $31,529.55. This is entirely speculative and unproved by the evidence.

(6) The court has failed to find the ultimate fact uncontradicted in the evidence as to the matter of submitting invoices, what the invoices showed, and the conduct of the parties with reference thereto, all concerning the payment of the Indiana Gross Income Tax. It has specifically
211 failed to find the ultimate facts on the subject of the payment of the Indiana Gross Income Tax, which the evidence showed occurred in a meeting between the parties in Gary, Indiana, in the month of December, 1954.

(7) Error of law in this: that the court admitted in evidence over objection of the defendant the contracts between State Line Generating Company and the plaintiff

for the construction of a generating station on Lake Michigan. In addition thereto it permitted evidence that Sargent & Lundy were the project engineers and that under contracts between those parties the Indiana Gross Income Tax was paid by the owner. The defendant was not a party to any of such contracts or arrangements or in privity therewith, and had no connection with said work on said contracts. This is set out in special finding Number 7. Such finding is based on evidence not legally admissible and thereby erroneous and prejudicial.

(8) The court failed to find the ultimate fact as to the agency, if any, the scope thereof, if an agency did exist, and the scope of the authority of Sargent & Lundy, project engineers.

(9) The court failed to find the ultimate facts on custom and usage in issue under paragraphs 2 and 3 of the complaint.

Edwin H. Friedrich,
R. Stanley Anderson,
Attorneys for Defendant.

Friedrich, Petrie & Tweedle,
Lawyer & Anderson,
Of Counsel.

Defendant requests oral argument on this motion.

212 THE UNITED STATES DISTRICT COURT.

(Caption—1446)

PROOF OF SERVICE.

Edwin H. Friedrich, being first duly sworn upon his oath, deposes and says: that he is one of the attorneys for the defendant in the above entitled cause; that the defendant's motion for new trial was duly filed herein on August 24, 1956, and that a copy thereof was duly mailed to Nash, Ahern & McNally, attorneys for the plaintiff, at their office address of 111 West Washington Street, Chicago, Illinois, on August 24, 1956, by depositing the same in the United States mail at Hammond, Indiana, postage prepaid, on August 24, 1956.

Edwin H. Friedrich.

Subscribed and sworn to before me this 24th day of August, 1956.

Bernard A. Petrie,
Notary Public.

(Seal)

My commission expires: Mar. 21, 1960.

213 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—1446) * *

PROOF OF SERVICE.

(Filed Sept. 12, 1956. Kenneth Lackey, Clerk.)

State of Indiana, } ss.
County of Lake. }

R. Stanley Anderson being first duly sworn on oath deposes and says that:

1. On September 12th, 1956 he filed with the Clerk of the above entitled Court at Hammond, Indiana, in the above entitled cause, the entry of appearance of John C. Lawyer and R. Stanley Anderson as additional counsel for the Defendant, Northern Indiana Public Service Company, an Indiana corporation, said appearance being in the form hereto attached, marked "Exhibit A," and

2. At substantially the same time, he deposited in the mail chute of the United States Post Office in Hammond, Indiana, a sealed envelope addressed to Nash, Ahern and McNally, 111 West Washington Street, Chicago 2, Illinois, attention Martin J. McNally, which envelope was duly stamped with the proper postage and contained a copy of said "Exhibit A."

Further affiant saith not.

R. Stanley Anderson.

Subscribed and Sworn to before me this 12th day of September, 1956.

Fred A. Kolb,
(Seal) *Notary Public.*

My Commission expires Nov. 11, 1957.

214 UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

APPEARANCE.

(Filed Sept. 12, 1956. Kenneth Lackey, Clerk.)

Mr. Clerk:

Enter my appearance as additional counsel for the Defendant, Northern Indiana Public Service Company, an Indiana corporation, in the above-entitled case.

Dated at Hammond, Indiana on 12th day of September, 1956.

John C. Lawyer,
R. Stanley Anderson,
5305 Hohman Avenue,
Hammond, Indiana,
Telephone WE 1-4530.

215 THE UNITED STATES DISTRICT COURT.
• • (Caption—1446) • •

ORDER.

(Filed Sept. 25, 1956. Kenneth Lackey, Clerk.)

The motion for new trial is denied.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
September 25, 1956.
Copies to: Nash, Ahern & McNally (card)
William S. Spangler
Edwin H. Friedrich
R. Stanley Anderson
John C. Lawyer

216 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana,
Hammond Division.

Herlihy Mid-Continent Company, an Illinois corporation,
vs.
Northern Indiana Public Service Company, an Indiana corporation
} No. 1446 Civil.

NOTICE OF APPEAL.

(Filed Oct. 19, 1956. Kenneth Lackey, Clerk.)

Notice is hereby given that the above named defendant, Northern Indiana Public Service Company, an Indiana corporation, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in this cause on the 17th day of August, 1956, in favor of the plaintiff, Herlihy Mid-Continent Company, an Illinois corporation, and against the defendant, Northern Indiana Public Service Company, an Indiana corporation, in the sum of $31,529.55, together with costs.

Edwin H. Friedrich,
Friedrich, Petrie & Tweedle,
5217 Hohman Avenue,
Hammond, Indiana,
R. Stanley Anderson,
Lawyer and Anderson,
5305 Hohman Avenue,
Hammond, Indiana,
Attorneys for Defendant.

Martin J. McNally,
Nash, Ahern & McNally,
111 West Washington Street,
Chicago, Illinois,
Attorneys for Plaintiff.

217 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1446) * *

(Filed Oct. 19, 1956. Kenneth Lackey, Clerk.)

State of Indiana, } ss.
County of Lake. }

Edwin H. Friedrich, being first duly sworn on oath deposes and says: that he is one of the attorneys of record in the above entitled appeal; that as such attorney he has served a full, true and complete copy of the Designation of the Record for and on Appeal in this case upon the attorneys of record for the plaintiff, namely: Messrs. Nash, Ahern & McNally, Attorneys at Law, 111 West Washington Street, Chicago, Illinois, by depositing the same, postage prepaid, in the United States mail at Hammond, Indiana, on the 19th day of October, 1956.

Edwin H. Friedrich.

Subscribed and sworn to before me this 19 day of October, 1956.

Flora M. Lembke,

(Seal) *Notary Public.*

My commission expires May 30, 1960.

218 UNITED STATES DISTRICT COURT.

(Caption—1446)

CERTIFICATE.

This is to certify that on the 19th day of October, 1956, the defendant Northern Indiana Public Service Company, an Indiana corporation, filed in the office of the Clerk, U. S. District Court, notice of appeal from the final judgment entered August 17, 1956.

Attest:

Kenneth Lackey,
Clerk,
By Jean Erickson,
Deputy Clerk.

Oct. 19, 1956.

Copies of above notice mailed to: Edwin H. Friedrich; Lawyer and Anderson, Martin J. McNally, Chicago, Ill. and William Spangler, Gary, Ind.

224 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—1446) • •

ORDER.

(Filed Oct. 22, 1956. Kenneth Lackey, Clerk.)

The defendant, Northern Indiana Public Service Company, shows to the court that it has duly filed its Notice of Appeal and Designation of the Record and now desires a stay of proceedings pending such appeal and presents its Supersedeas Bond in the penal sum of Thirty-five Thousand Dollars ($35,000.00), with United States Fidelity and Guaranty Company as surety thereon, conditioned as by law and the rules of this court required.

The court having examined said bond does now approve the same and endorses its approval thereon, and the proceedings herein are stayed until the termination of said appeal.

Dated this 22 day of October, 1956.

Luther M. Swygert,
Judge.

226 IN THE UNITED STATES DISTRICT COURT.
(Caption—1446)

ORDER TO SEND UP THE ORIGINAL EXHIBITS AS PART OF THE RECORD ON APPEAL.

(Filed Nov. 1, 1956. Kenneth Lackey, Clerk.)

It appearing to the court that it is necessary and proper in this cause that all of the original exhibits, both those offered and those introduced in evidence, should be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit as a part of the record on appeal for use in such appeal by the appellate court;

It Is Therefore Ordered that the Clerk of this Court is directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit with and as a part of the record on appeal herein, all the original exhibits, both those offered and those introduced in evidence, and all of said exhibits need not be copied in the record on appeal. After the disposition of said appeal all of said original exhibits shall be returned to the Clerk of this Court.

Dated this 1 day of November, 1956.

Luther M. Swygert,
Judge of the United States District Court for the Northern District of Indiana, Hammond Division.

230 United States of America,
Northern District of Indiana. } ss.

I, Kenneth Lackey, Clerk of the United States District Court for the Northern District of Indiana, do hereby certify that the annexed and foregoing is the transcript on appeal in the matter of: Herlihy Mid-Continent Co., an Illinois Corp., *vs.* Northern Indiana Public Service Co., an Indiana corp., #1446 Civil, which transcript includes the original court file of the Clerk U. S. District Court, the original exhibits and the court reporters' transcript of proceedings now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Hammond, Indiana, this 28th day of November, A. D. 1956.

Kenneth Lackey,
Clerk.

(Seal)

By Jean Erickson,
Deputy Clerk.

Office - Supreme Court, U.S.
FILED
OCT 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,
Respondent
(Plaintiff-Appellee).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN C. LAWYER,
5305 Hohman Avenue,
Hammond, Indiana,
Counsel for Petitioner.

LAWYER, FRIEDRICH, PETRIE & TWEEDLE,
EDWIN H. FRIEDRICH,
R. STANLEY ANDERSON,
EDMUND A. SCHROER,
5217 Hohman Avenue,
Hammond, Indiana,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Petitioner
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,

Respondent
(Plaintiff-Appellee).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

Northern Indiana Public Service Company, an Indiana corporation, a public utility, by its counsel, respectfully represents to this Honorable Court as follows:

(a) The Court of Appeals' opinion is officially reported in:

Herlihy Mid-Continent Company v. *Northern Indiana Public Service Company*, 7th Cir., 1957, 245 F. 2d 440,

and is appended hereto at pages 21 to 28. The United States District Court (Northern District of Indiana,

Hammond Division) did not render an opinion. The findings of fact, conclusions of law and decree of the District Court appear at pages 328 through 334 of the transcript filed in accordance with Rule 21(3) and are appended hereto at pages 29 to 35.

(b) The grounds on which the jurisdiction of this Court is invoked are concisely stated as follows:

(i) The Court of Appeals' opinion was entered on June 21, 1957.

(ii) On July 23, 1957, the Court of Appeals denied petitioner's rehearing petition which had been filed within the time allowed by the Rules of the Court of Appeals. The order denying the petition for rehearing is appended hereto at page 36.

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are contained in 28 U. S. C. 1254(1) and 28 U. S. C. 2101(c).

(c) The questions presented for review are:

(i) The Court of Appeals for the Seventh Circuit has sanctioned a departure so far from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of the power of supervision of the Supreme Court of the United States.

Over petitioner's objection, the trial court admitted contracts of the respondent with third parties into evidence. The contracts were offered for the purpose of showing that a third party had paid the respondent's Indiana Gross Income Tax on construction projects to which the petitioner was a stranger. The sole question in the trial court was whether petitioner, by contract, assumed liability for the Indiana Gross Income Tax for which respondent was liable by an Indiana statute. The Court of

Appeals held this ruling by the trial court to be error, but declined to reverse the judgment even though the trial court made a material finding of fact relying on said contracts when there was no other evidence in the record to support such finding. It is an unprecedented and startling doctrine to decide that a party has no redress where it suffers an adverse judgment based on erroneously admitted evidence.

(ii) The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with the applicable state law of Indiana.

First. The decision below construing the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax is in irreconcilable conflict with decisions of the Supreme Court of Indiana approved by this Court, which clearly show that the Indiana Gross Income Tax is not a tax upon work performed, but is a tax upon income received without regard to the source thereof.

Second. The Court of Appeals, in direct conflict with an applicable decision of the Indiana Supreme Court, holds that on cost plus construction contracts executed and performed in the State of Indiana, responsibility for payment of the Indiana Gross Income Tax was shifted to the petitioner as costs.

Third. The Court of Appeals overruled one of its own decisions, *sub silentio*, and applicable Indiana decisions to allow shifting of a tax from the statutory taxpayer (respondent) without an express contractual agreement to so shift the tax in question.

(d) This case involves the following statutes:

(i) "State laws as rules of decision. Laws of the several states, except where the Constitution or treaties of the United States or acts of Congress other-

wise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. 1652."

(ii) "64-2602—Levy of tax—Date.—There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided. Acts 1933, ch. 50, § 2, p. 388; 1937, ch. 117, § 2, p. 604." (Burns Ind. Stat., Sec. 64-2602).

(iii) "(g) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (f) inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal eservices, or services of any character whatsoever, sales of real estate, rentals, all funds received for the performance of contracts, all funds received from the investment of capital, all receipts from retail sales and all receipts received from any source whatsoever, the tax shall be equal to one (1) per cent of such part of the gross income. The term 'retail sales' shall mean any sale of any property not included within the definitions of 'wholesale sales' and 'selling at retail'." Acts 1933, ch. 50, § 3, p. 388; 1937, ch. 117, § 3, p. 604; 1941, ch. 140, § 2, p. 418; 1945, ch. 310, § 1, p. 1380. (Burns Ind. Stat., Sec. 64-2603.)

(e) A concise statement of the case and basis for federal jurisdiction in the court of first instance.

Petitioner, Northern Indiana Public Service Company, an Indiana corporation, defendant in the District Court, entered into several construction contracts with Herlihy Mid-Continent Company, an Illinois corporation, plaintiff in the District Court, under which respondent was to build a generating station for the petitioner in Indiana. The contracts were executed and performed in Indiana. The respondent claims that it has paid Gross Income Tax to the State of Indiana and filed a complaint on four of the contracts alleging a breach of the same for failure and refusal of petitioner to pay the said tax assessed against respondent. The District Court found in favor of respondent on three of the contracts (one claim having been abandoned) and entered judgment for the respondent and against the petitioner in the sum of $31,529.55. The Court of Appeals affirmed the decision adverse to petitioner.

On August 13, 1948, the parties entered into a contract identified as K-814 for the erection and construction of an electric generating station at Michigan City, Indiana (Transcript 10-29). It was a "fixed fee" contract and provided for payment of the net cost of the work plus a fixed fee and a fixed equipment rental (Transcript 14). The net cost was described in Section 15. Such section is as follows:

> "15. It is mutually agreed that the net cost of the work shall include all expenses incurred by the contractor which are directly chargeable to the work and that said net cost of the work shall, without restricting the generality of the foregoing, include the following items:
>
> . . . . .
>
> (h) amounts required by any federal, state or local taxes applicable to the work, including old age benefit and unemployment taxes." (Transcript 15-16.)

On October 19, 1948, the parties entered into a further written contract identified as K-825 (Transcript 29-41). This contract was similar to K-814 in provisions as to payment. It also provided payment for amounts required by any federal, state or local taxes applicable to the work, including old age benefit and unemployment taxes (Transcript 31). Under this contract the parties executed Extra Order No. 1 providing for additional work but the payment was as specified in the main contract (Transcript 41).

On October 27, 1948, the parties entered into a further written contract identified as K-851 (Transcript 42-47). This contract was different in its provisions than the other two and it contained as Clause 9 the following:

> "Purchaser, in consideration of the undertakings and guarantees of Contractor and of the faithful accomplishment of the work, agrees to pay to Contractor an amount (subject to adjustment as provided for under Clause 13, and as set forth on page 2 of Contractor's Summary of Proposal (Exhibit 'C')), to be computed on the basis of the following prices for unloading and erection:
>
> | | |
> |---|---|
> | Structural members | $0.035 per pound |
> | Coal bunkers | $0.080 per pound |
> | Riveted steel stacks | $0.080 per pound |
> | Bracing members | $0.035 per pound |
> | Column baseplates | $0.035 per pound |
>
> The amount to be paid to Contractor for the material to be erected hereunder is estimated by the Consulting Engineers to be Seventy-nine Thousand One Hundred Fifty Dollars ($79,150.00)." (Transcript 46.)

and had this additional provision:

> "3. 'Cost Plus' basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance;

plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is 37½%." (Transcript 44.)

On November 18, 1948, a further contract was entered into between the parties providing for the driving of sheet piling at "cost plus 4%" (Transcript 48-50). Although sued on in the complaint the respondent abandoned claims to recovery under that contract (Transcript 75).

The first work on the entire project was performed under contract K-814. On September 30, 1948, the respondent sent its first invoice under such contract (Transcript 171). This set forth the amounts for labor, material and other charges and did not include any Indiana Gross Income Tax. This invoice was paid. On October 30th, November 16th and November 30th, 1948, the next three invoices were forwarded. Each of these invoices had an item or charge for Indiana Gross Income Tax. The invoice of November 16, 1948, had an item for the Indiana Gross Income Tax which had been omitted from the invoice of September 30, 1948 (Transcript 172). Then a telephone conversation occurred relative to the Indiana Gross Income Tax between F. J. Herlihy, the president of the respondent company, and Arthur Hartman, of the petitioner's purchasing department (Transcript 172). This led to a meeting in the office of the defendant at Gary, Indiana, on December 28, 1948 (Transcript 180). At this meeting F. J. Herlihy, president of the respondent, and Hartman and Lindeman, for the petitioner, were present. In this meeting Hartman told Herlihy that "This tax is a tax upon you as a penalty for doing business in the State of Indiana." (Transcript 181-182.) Herlihy replied: "I know what the Indiana Gross Income Tax is. Strike it off of the bills. We will not bill you for it." (Transcript 182.) After the close of the meeting but on the same day

Hartman forwarded to Lawyer & Anderson, General Counsel for the petitioner company, a letter confirming the result of the meeting (Transcript 182-184). The petitioner deleted the charge for Indiana Gross Income Tax from these three invoices and then paid the amount of such invoices to the respondent minus the tax. The first billing after such meeting was December 31, 1948, and this invoice did not include any charge for Indiana Gross Income Tax (Transcript 185).

After the Gary meeting on December 28, 1948, the respondent submitted nineteen further invoices under contract K-814. None of them had any charge for Indiana Gross Income Tax. Such invoices were paid by the petitioner to the respondent (Transcript 186-188).

Under contract K-851 the first invoice was submitted by the respondent under date of August 5, 1949 (Transcript 188). This invoice contained a charge for Indiana Gross Income Tax which was eliminated from the invoice by the respondent's own Chief Clerk, John K. Cooper (Transcript 135, 188-190). Seventeen separate invoices were later submitted under this contract, the first on August 5, 1949, and the last on November 30, 1950. In none of the invoices under this contract, except the first under date of August 5, 1949, as heretofore described, did the respondent bill for the Indiana Gross Income Tax (Transcript 190-191).

Under contract K-825, forty-two invoices were submitted, the first on March 1, 1949, and the last on April 17, 1952. None contained a charge for the Indiana Gross Income Tax (Transcript 191).

On Extra Order No. 1 under contract K-825, thirty-six invoices were sent to petitioner, the first on July 22, 1949, and the last on February 14, 1952. Not one contained a charge for the tax in question (Transcript 191).

Petitioner did not pay any Gross Income Tax under any of the contracts in question. Petitioner did pay all of the invoices as submitted without any Indiana Gross Income Tax billing (Transcript 192).

Twenty-three months after the conference of December 28, 1948, and commencing on November 30, 1950, the respondent submitted separate invoices in which the only item billed was the Indiana Gross Income Tax (Transcript 240). These invoices, solely for the Indiana Gross Income Tax, were not processed as the other invoices were processed. They were sent directly to the petitioner (Transcript 148, 219). They were not sent to Sargent & Lundy, Project Engineers; were not approved for payment; and were not paid (Transcript 202). A conversation regarding those separate billings was had between Herlihy, President of the respondent company, and Arthur J. Hartman, Assistant Purchasing Agent of the petitioner company, on or about March 15, 1952, when Herlihy inquired: "What are you going to do about the Income Tax"? and Hartman said, "Well, Mr. Herlihy, you agreed there would be no Income Tax," to which Herlihy replied: "That's right, but something has come up and I have changed my mind" (Transcript 213).

Contract K-814 provided that the petitioner was to retain a certain percentage of the amount paid for the work until the work was fully completed and accepted (Transcript 17). On May 11, 1950, the petitioner released the retained percentage on that contract (Transcript 207) and in submitting its invoice under that contract the respondent also submitted a waiver of mechanic's lien for all work done thereunder. No Indiana Gross Income Tax appears on that invoice (Transcript 207). The withholding features of the Indiana Gross Income Tax were avoided by respondent's filing of an affidavit within the meaning of Section 17 E of the Act (Transcript 205-206).

Over petitioner's objection respondent was allowed to prove and introduce in evidence certain contracts it had made in 1943 with one Chicago District Electric Generating Company; the respondent was paid the Indiana Gross Income Tax by said third party (Transcript 79-88; Plaintiff's Exhibits 1-11, both inclusive). The respondent was also allowed to prove its overhead in four (4) states (Transcript 123), and profit and loss (Transcript 131), all over petitioner's objections.

The respondent paid the Indiana Gross Income Tax on all of the moneys it received under contracts K-814, K-825, Extra Order to K-825, and K-851, from the year 1948 to the end of the year 1951 (Transcript 120). The payments to the State of Indiana were made quarterly (Transcript 160). The record is silent as to the amount of Income Tax paid the State of Indiana.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Northern District of Indiana, was diversity of citizenship, 28 U. S. C. 1332.

ARGUMENT.

1. The Court of Appeals has sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The judgment against petitioner for $31,529.55 is based upon the *theory that* the Indiana Gross Income Tax "is "applicable to the work" under contracts between the parties. This is in direct conflict with decisions of the Supreme Court of Indiana holding that the Indiana Gross Income Tax is a direct tax upon the contractor's income and not an operating cost.

In determining the litigation adversely to petitioner, the trial court relied on certain contracts of the respondent with Chicago District Electric Generating Corporation. Pursuant to Rule 12(4) and Rule 21(1), the original copy of those contracts, marked Plaintiff's Exhibits 1 and 2, and certain estimates and billing thereon marked Plaintiff's Exhibits 3, 4, 5, 6, 7 and 8, are presently in the custody of the Clerk. Those contracts were made in 1943, five years before the transactions in issue were commenced. They were admitted in evidence, over petitioner's vigorous objection, to show that Chicago District Electric Generating Corporation paid respondent the Indiana Gross Income Tax due the State of Indiana from respondent when respondent built a generating station for the Chicago District Electric Generating Corporation. A careful search of the record will fail to disclose a scintilla of evidence that petitioner had any notice of knowledge of either the execution or existence of respondent's contracts with the Chicago District Electric Generating Corporation. It has been unchallenged throughout this litigation that petitioner is a stranger to those contracts.

The most obvious nature of the error is demonstrated by the decision in *City of Chicago* v. *Greer* (1870), 76 U. S. 726, 19 L. Ed. 769. There the plaintiff was the seller of certain fire hose to the defendant city under a written contract. The city refused to accept delivery and judgment was entered for the plaintiff on his suit for breach of contract. The city, seller, complained of the refusal of the Circuit Court of the United States for the District of Northern Illinois to allow in evidence its agreements with other suppliers. In that case it is stated:

> "It is impossible to see how this could have had any legitimate bearing upon the questions presented by the case. If the City was liable at all to the plaintiff, clearly its liability can be measured only by the contract made with him. The extent of its obligation is not to be found in another contract made with another party." (76 U. S. at page 733, 19 L. Ed. at page 771.)

The Court of Appeals noted that these contracts of respondent with Chicago District Electric Generating Corporation were *res inter alios*, stating:

> "As to the previous contracts in which plaintiff was paid the tax as part of its costs, we think that the court was in error in allowing such evidence to be introduced, as it had no probative value in interpreting the contractual terms here at issue." (245 F. 2d at page 444; Appendix at page .)

In failing to reverse the judgment of the trial court on account of this manifest error, however, a far departure from the accepted and usual course of judicial proceedings was sanctioned. It is difficult to conceive of evidence which could be more harmful and prejudicial to the petitioner. The single issue in the case was whether petitioner was responsible, under construction contracts for the construction of a generating station in Indiana, to reimburse the respondent contractor for the Indiana Gross Income Tax

paid by the respondent. In determining that issue, erroneously admitted evidence was allowed to show that respondent had been paid the Indiana Gross Income Tax under a construction contract for the construction of a generating station in Indiana by Chicago District Electric Generating Corporation. It is, therefore, abundantly clear that the evidence went to the base of this litigation.

Petitioner respectfully submits that the very cases on which the Court of Appeals relied to affirm the judgment of the trial court show that the error committed was in fact reversible. In *Builders Steel Company* v. *C. I. R.*, 8 Cir. (1950), 179 F. 2d 377, 379, it appears that it is reversible error to make an essential finding which is supported only by incompetent evidence. The fact that this is an essential part of the rule is also clearly shown from the case of *Freightways, Inc.* v. *Stafford*, 8 Cir. (1955) 217 F. 2d 831, where it was stated:

> "It is to be presumed in an action tried to the court without a jury that only competent evidence will be considered but counsel for plaintiffs are contending that the evidence was competent and that it tends to sustain the claim of negligence on behalf of defendants. *If it was considered by the court and given any weight whatever it was error to do so.*" (Emphasis added), 217 F. 2d at p. 837.

The full import of the rule of law is that a reliance by the trial court on incompetent evidence does require a reversal. There can be no question in this case but that the trial court relied on the incompetent evidence and construed the contracts between plaintiff and defendant on the basis of plaintiff's contractual relations with strangers and that such a ruling is within the prohibitions of the very cases relied on in the opinion of the Court of Appeals (245 F. 2d at page 444, Appendix at pages 27-28). The conclusive nature of the trial court's reliance on the incompetent

evidence is shown in its own Finding of Facts and Conclusions of Law, particularly Finding of Fact No. 7, which is as follows:

> "For some time prior to the time that plaintiff made its bids to do the 'Work' provided for in the contracts involved in this action and up to the time the contracts here in question were executed between plaintiff and defendant, the plaintiff, as a contractor, was having business dealing with the aforesaid firm of Sargent & Lundy, in that plaintiff was performing construction work in the State of Indiana for Chicago District Electric Generating Corporation, which was commonly called the 'State-line' job. Sargent & Lundy were the engineers for the Chicago District Electric Generating Corporation on the 'State-line' job acting in the same capacity as they did for the defendant in the construction of the aforedescribed extension to its generating station on Lake Michigan, near Michigan City, Indiana. On this 'State-line' job the plaintiff billed for and was paid as part of its costs the Indiana Gross Income Tax on all cost work." (Transcript 331, Appendix at page 32.)

This finding of fact precludes any argument that the trial court disregarded the incompetent evidence. On the contrary, it shows the reliance of the trial court on the erroneously admitted evidence. A careful search of the record will disclose that there is no other evidence to support this finding of fact.

It is thus apparent that the Court of Appeals has sanctioned a practice allowing a trial court to rely on erroneously admitted evidence with impunity and deny the aggrieved party any redress even though the evidence so admitted is of a most prejudicial nature. Petitioner is unable to find a single reported decision in any court of the United States or any statute, regulation or rule, which gives a trial court the powers which, without precedent, have been sanctioned here.

2. The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with applicable state law.

The contracts in question are Indiana contracts since the work was performed in Indiana and payments made in Indiana. In addition, the Indiana Gross Income Tax is an Indiana tax assessed under an Indiana statute and confined by its terms to limits to the State of Indiana. Therefore, the law of Indiana, including the judicial construction thereof, defining the nature and extent of the tax and construction of the contracts is controlling. *Great Northern Railroad Company* v. *Sunburst Oil Refining Co.* (1932), 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360; *Coombes* v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866; *Douglass* v. *The County of Pike* (1889), 101 U. S. 677, 25 L. Ed. 968.

(i) The Court of Appeals construes the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax. This is clearly demonstrated in the conclusion of the Court of Appeals that:

> "Therefore, 'state taxes * * * applicable to the Work * * *' quite clearly seem to have been intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plaintiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, we conclude that the tax was directly attributable to and in fact, a part of the work, namely, the entire performance of the contracts." (245 F. 2d at page 443, Appendix at pages 25-26.)

This construction of the Indiana Gross Income Tax is in irreconcilable conflict with the decisions in *J. D. Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365; *Gross Income Tax Division* v. *Strauss* (1948), 226 Ind. 329, 79 N. E. 103; *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372.

Since the decisions in those three cases, there can be no construction of this state tax making it other than a gross income tax. The decision of the Court of Appeals fails to note that an income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived. It is that failure which leads to an important unsupported misconstruction of the Indiana Gross Income Tax in conflict with controlling precedent. In *J. D. Adams Manufacturing Company* v. *Storen*, it was stated that:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources within the State. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. * * *" (304 U. S. at page 310, 58 Supreme Court at page 913, 82 L. Ed. at page 1368.)

It is, therefore, an obvious and erroneous misconstruction of the Indiana Gross Income Tax to hold, as did the Court of Appeals, that the tax is "applicable to the work" rather than a tax on the income received regardless of the source of the income.

(ii) The Court of Appeals also held that:

> "*Mann* v. *Schnarr*, 228 Ind. 654, 95 N. E. 2d 138 is not determinative of the question, for, although the contract therein provided that the contractor would be paid on a cost plus 10% basis, nevertheless the contract was general in nature and did not specifically define costs. The court concluded, therefore, that the Indiana tax constituted an overhead charge rather than an operating cost. Obviously, such a holding can have no bearing whatever on the situation, as we have already shown that the parties, by the terms of their contracts, included the tax within the scope of operating costs." (245 F. 2d at page 444, Appendix at page 26.)

To say that the case is rendered inapplicable because costs were not defined in the contract in that case, is to state a distinction without a difference. Certainly the terms of a contract between private parties cannot change the nature of a tax passed by a state legislature nor the construction of that tax made by the Supreme Court of the United States in *J. D. Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, and by the Supreme Court of Indiana in *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372. There is no need to speculate, theorize or construe the nature of Indiana Gross Income Tax liability on a construction contract in Indiana. The case of *Mann* v. *Schaaf* (1950), 228 Ind. 654, 95 N. E. 2d 138, expressly declares the law of Indiana to be that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work.

(iii) The Court of Appeals has ignored a well established and important rule of law that the burden of the payment of a tax is not shifted from the statutory taxpaper by contractual agreement except by express language and a clear and unmistakable intention to so shift the burden.

There was no express promise by the petitioner to pay the Indiana Gross Income Tax. A search of the record will disclose that the tax is not mentioned in any of the contracts between the parties. The only language relating to the payment of taxes is in sub-paragraph (h) of clause 15 where the petitioner promises to pay:

> "expenses incurred by the contractor which are directly chargeable to the work * * * all amounts required by any federal, state or local taxes applicable to the work, including old age benefits and unemployment taxes." (Transcript at pages 15 and 16.)

Petitioner paid respondent's old age benefits and unemployment taxes but did not pay any of respondent's income taxes, state or federal.

Under these circumstances, the case of *Owen* v. *Fletcher Savings & Trust Building Co.* (1934), 99 Ind. App. 365, 189 N. E. 173, is controlling. In that case the lessor contended that the lessee was liable for the Federal Income Tax under the provisions of a lease written a year before the passage of the tax because of a provision that the lessee would pay the federal, state and local taxes assessed on the real estate or improvements thereon at any time during the period of the lease, or which would thereafter be assessed upon the right of the lessor to receive rentals under the lease. The lease in question was for a period of 99 years and the lessor contended that the passage of the Federal Income Tax was contemplated by the parties at the time of executing the lease and that accounted for the provision relating to the assessment of future taxes. The court affirmed a judgment for the lessee on the ground that there was no express promise by the lessee to pay for an income tax, stating:

> "The general rule is that, unless the covenants of the lease expressly provide that lessee shall pay the income tax that may be required of the lessor on the rentals received by him from the lessee, the lease will not be enlarged by reading therein an obligation on the part of the lessee to pay any part of the lessor's income tax—the principle '*expressio unius est exclusio alterius*,' applying where the lease specifically designates the taxes which the lessee is to pay." (99 Ind. App. at page 376; 187 N. E. at page 177.)

and applying that principle said:

> "Nowhere is an income tax expressly mentioned or referred to. *If the parties contemplated or intended that the lessee should pay the income tax assessed against the lessor on rent received by her under the*

lease, such a condition could and evidently would have been inserted in the lease by the use of a few simple, plain words, thereby eliminating any uncertainty. * * * To expand the meaning of the clause 'or which may be assessed upon the right of the lessor to receive the rentals hereunder during this lease' to include the payment of taxes upon the personal income of the lessor by the lessee, would require us to ignore the rules of construction which have been followed by the courts of other jurisdictions under like circumstances." (Emphasis added.) (99 Ind. App. at page 381; 189 N. E. at page 179.)

In failing to follow this precedent and rendering its decision in conflict with the Indiana law, the Court of Appeals also overruled, *sub silentio*, its decision in *Illinois Central* v. *Indianapolis Union P. Co.*, 7 Cir., 1925, 6 F. 2d 830. There a lessee had paid lessor's income tax from 1910 until filing a suit in 1921, and the Court of Appeals reversed a judgment adverse to the lessee on the principle that unless a contract *expressly* provides for the shifting of a tax the burden is not shifted. That principle is now overruled by silence even though it is in accord with the applicable Indiana rule.

There is not a single case cited in the opinion of the Court of Appeals which would justify a departure from the long standing rule that a tax is not shifted from the person upon whom it is placed by statute except by an express agreement showing a clear and unmistakable intention to shift the tax.

The Court of Appeals for the Seventh Circuit having sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of the Supreme Court of the United States, and having decided important state questions in conflict with the applicable state law,

petitioner respectfully urges that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that, upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11922. SEPTEMBER TERM 1956, APRIL SESSION 1957.

HERLIHY MID-CONTINENT COMPANY, *Plaintiff-Appellee,*
v.
NORTHERN INDIANA PUBLIC SERVICE COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 21, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Plaintiff sued to recover, under the terms of certain contracts, amounts exacted from and paid by it under the Indiana Gross Income Tax Law. Burns, Indiana tSats. § 64-2062, § 64-2603(g). The cause, tried by the court without a jury, resulted in judgment for plaintiff in the sum of $31,529.55.

Multiple construction contracts were consummated between the parties wherein plaintiff, a building contractor, agreed to perform certain work in connection with the construction of defendant's generating system near Michigan City, Indiana. The first contract, identified as K-814, exe-

cuted August 13, 1948, provided that the contractor would be paid for the "net cost" of the work, plus a fixed fee covering overhead and profit and a fixed equipment rental. In other words, plaintiff agreed to advance all costs, and for them it was to be reimbursed, in addition to overhead and profit. The contract defined "net cost" as follows: "It is mutually agreed that the Net Cost of the work shall include all expenses incurred by Contractor which are *directly chargeable to the work*, and that said Net Cost of the work shall, without restricting the generality of the foregoing, including the following items: * * * Amounts required by any Federal, State or local taxes *applicable to the Work*, including old age benefit and unemployment taxes. * * *" (Emphasis supplied). Thus, it is to be kept in mind that the contract specifically defines by way of example but not by way of exclusion expenses "directly chargeable to the work" in part as State taxes "applicable to the work."

On October 19, 1948, the second contract, K-825, was executed. It defined the term "net cost" in precisely the same terminology as that employed in contract K-814. The third contract, K-851, dated October 27, 1948 differed from the other two in that payment was based on firm unit prices rather than "net cost plus a fixed fee." However, it contained a cost provision, with which we are here concerned, by including in the extra work clause the following provision: "'Cost Plus' basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, use of hand tools and profit * * *"

All the instruments were prepared by the engineering firm of Sargent and Lundy, employed by defendant to pre-

pare contracts, plans and specifications, and to aid in the procurement of bids. After contracts were awarded, their further duties entailed supervising construction and checking and approving invoices submitted by the contractor.

After commencement of work under contract K-814, plaintiff sent defendant several invoices. The first in point of time, that of September 30, 1948, set forth amounts claimed to be due for labor, materials and other items, but did not include a charge for the Indiana Gross Income Tax. Later, however, invoices dated October 30, 1948, November 16, 1948, and November 30, 1948, respectively, contained as an item of cost the tax applicable to moneys received by plaintiff for performance of the work. The November 16th invoice included a charge for the tax item which had been omitted from the initial September bill. After the invoices had been examined and tentatively approved by defendant they were forwarded to Sargent and Lundy, by whom they were then checked and certified for payment. After this certification, the invoices were mailed to defendant's principal office where that part of each pertaining to the tax was stricken, defendant refusing to pay it as an item of cost. As a result of the controversy as to which of the two contracting parties should ultimately bear the thrust of this item, on December 28, 1948, a meeting was held between plaintiff's president, now deceased, and two employees of defendant, as a result of which, it was decided that the demand for the tax would be stricken from the bills. Defendant contends that in the event that the terms of the contract are found to be ambiguous, this conduct of the parties should be construed as a practical construction of the terms of the contract by the parties. In the event that an interpretation favorable to plaintiff is reached, it is urged that by its action plaintiff has waived its right to reimbursement under the contract.

Subsequent to the meeting of December 28, plaintiff sent

19 invoices under contract K-814 wherein no charge was included for the tax, all of which were paid by defendant. The tax item was not included in any of the 42 invoices submitted under contract K-825. Under contract K-851 the first invoice of August 5, 1949 contained a charge for the Gross Income Tax, but it was later eliminated. Subsquent invoices under contract K-851 did not contain charges for the tax. However, on November 30, 1950, plaintiff commenced submitting separate invoices which included only charges for the tax: these were never paid by defendant. Plaintiff continued to pay the entire Indiana income tax attributable to the moneys received from defendant and it is to recover that amount that this suit was brought.

We lay aside for the moment the issues involving the alleged waiver and certain evidentiary questions, for it is first necessary to determine whether the construction placed upon them by the trial court can be sustained. The court found: "The State of Indiana Gross Income Taxes in the total amount of $31,529.55 which the plaintiff paid on moneys received from the defendant as net costs for expenses incurred by plaintiff are state taxes applicable to the Work, and under the provisions of the contracts in question the plaintiff is entitled to payment from the defendant of such State of Indiana Gross Income taxes as part of plaintiff's net costs of the Work."

In approaching the problem, it is well to keep in mind that the parties, as a matter of contract, may shift the burden of the tax. Thus, Regulation 404, of the Gross Income Tax Division of the State of Indiana, in effect at all times pertinent to this litigation, provided: "Passing the Tax on.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a matter of contractual agree-

ment between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts. Since taxpayers are not made the agents of the State to collect gross income tax, any amount added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a part of the gross receipts of a taxpayer and must be reported as taxable income." And, it is equally clear that we are dealing with a privilege tax upon the receipt of gross income as distinguished from a tax on property. See *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307; *Gross Tax Division* v. *Strauss*, 226 Ind. 329, 79 N.E. 2d 103. Despite the verity of these statements, it becomes essential to examine with particularity the pertinent provisions of the contracts relating to the definition of costs.

As previously pointed out, the key phrase in relation to contracts K-814 and K-825 is the provision providing that defendant will reimburse plaintiff for "amounts required by any federal, state or local taxes applicable to the Work, including old age benefit and unemployment taxes." Defendant insists that the phrase "applicable to the Work" specifically limits the type of tax included and urges that the nature of this specific tax necessarily excludes it from the defined classification. We find ourselves unable to subscribe to this contention. First, it must be pointed out that "work" is defined in the contract as follows: "The term 'Work' includes such labor, methods, material, equipment, and transportation or other faciilties as may be necessary to complete the contract." Thus, the term "work" is by contractual definition a term broad in scope and meaning, connoting, we think, the entire performance of the construction contract. Therefore, "state taxes * * * applicable to the Work * * *" quite clearly seem to have been

intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plaintiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, we conclude that the tax was directly attributable to and, in fact, a part of the work, namely, the entire performance of the contracts. Consequently, we agree with the conclusion of the trial court not only with respect to contracts K-814 and 825, but that this was likewise the intention of the parties under the "tax" clause of the extra work provision of contract K-851.

Mann v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138 is not determinative of the question, for, although the contract therein provided that the contractor would be paid on a cost plus 10% basis, nevertheless the contract was general in nature and did not specifically define costs. The court concluded, therefore, that the Indiana tax constituted an overhead charge rather than an operating cost. Obviously such a holding can have no bearing whatever on the situation, as we have already shown that the parties, by the terms of their contracts, included the tax within the scope of operating costs.

The next problem with which we are confronted is whether certain acts of plaintiff constituted a waiver of its right to reimbursement for taxes paid. The trial court specifically found in its findings of fact "that plaintiff never withdrew or waived its claim against defendant for the payment of such taxes." Without detailing the course of events other than as previously set forth, from an examination of the entire record, we can not say that the finding of the district court on this point is clearly erroneous. In so holding we are mindful of the admonition of Rule 52(a) of the Federal Rules of Civil Procedure that

"due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Finally, it is contended that the court committed reversible error in admitting certain evidence. The most important question in this respect revolves around evidence pertaining to contracts, invoices and related documents which disclosed that in previous analogous jobs, handled through Sargent and Lundy, the construction contractor had been paid as part of its operating costs the Indiana Gross Income Tax assessed against it. However, it is significant that these were contracts to which defendant was not a party. Further, the court received in evidence plaintiff's profit and loss on the work done under the contracts in question as well as plaintiff's general overhead for the years 1948 through 1951.

As to the previous contracts in which plaintiff was paid the tax as part of its costs, we think that the court was in error in allowing such evidence to be introduced, as it had no probative value in interpreting the contractual terms here at issue. These matters were *res inter alias*. In *Shell Petroleum Corp.* v. *Earnest*, 97 Ind. App. 483, 485, 187 N.E. 211, in referring to testimony concerning related operations and terms of employment in determining the terms of employment then at issue, the court said: "They were in no way connected with or related to the issues or questions being litigated between appellant and appellee, or to any business transactions had between them." And, as was aptly stated in *Huntington Post No. 7, etc.* v. *Arnold*, 123 Ind. App. 160, 166, 109 N.E. 2d 98, 101: "The fact that appellant made other contracts with other persons on a cost plus basis would not tend to prove that the contract with appellee was such as appellee asserts. It was appellant's privilege to make as many and as varied contracts as it could." See also, *Wacker* v. *Essex*, 67 Ind. App. 584, 119 N.E. 466.

However, it must be reemphasized that this was tried before the court and not by a jury. Consequently, on appeal, it is presumed that only competent evidence was considered as a basis for the conclusion of the court. *Trinity Universal Insurance Co.* v. *Smithwick*, 222 F. 2d 16 (CA-8); *Freightways, Inc.* v. *Stafford*, 217 F. 2d 831 (CA-8). Furthermore, as was succinctly stated in *Builders Steel Co.* v. *C.I.R.*, 179 F. 2d 377, 379 (CA-8): "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. *Thompson* v. *Carley*, 8 Cir. 140 F. 2d 656, 660; *Doering* v. *Buechler*, 8 Cir. 146 F. 2d 784, 786; *Grandin Grain and Seed Co.* v. *U.S.*, 8 Cir., 170 F. 2d 425, 427." See also *Wisconsin Hydro Elect. Co.* v. *Equitable Fire & M. Ins. Co.*, 233 F. 2d 313 (CA-8)." As we have already concluded that there was sufficient competent evidence to sustain the decision of the trial court, we hold that no reversible error was committed.

The judgment is affirmed.

THE UNITED STATES DISTRICT COURT.

Northern District of Indiana,

Hammond Division.

HERLIHY MID-CONTINENT COMPANY, an Illinois corporation,

vs.

NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana corporation.

No. 1446 Civil

FINDINGS OF FACT; CONCLUSIONS OF LAW AND JUDGMENT.

The above entitled cause came on regularly for trial, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT.

1. The plaintiff is a corporation organized and existing under the laws of the State of Illinois, duly authorized to transact business in the State of Indiana, and is engaged in the general contracting business. The defendant is a public utility corporation organized and existing under the laws of the State of Indiana, and is engaged in the manufacture and distribution of electric power and gas. The amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

2. The plaintiff, Herlihy Mid-Continent Company, of Chicago, Illinois, and the defendant, Northern Indiana Public Service Company, of Hammond, Indiana, executed two written contracts, identified on their face as K-814, dated August 13, 1948, and K-825, dated October 19, 1948, whereunder the plaintiff, as a general and independent contractor, agreed for fixed fees and its net costs, to perform

and complete certain work and furnish all labor, materials, equipment, tools and supplies required therefor, in the construction of parts of the extension of the defendant's generating station on Lake Michigan, west of the harbor at Michigan City, Indiana. The plaintiff and the defendant executed a further contract, identified on its face as K-851, which is dated October 27, 1948, whereunder plaintiff, for firm fixed unit prices, agreed to unload, erect and finish structural steel for the main building of said generating station.

3. The plaintiff satisfactorily performed and accomplished all the work required under its aforesaid contracts with the defendant in accordance with the terms and provisions thereof, and the plaintiff has been paid all monies it claimed due from the defendant, except the State of Indiana Gross Income Tax, upon the monies defendant paid plaintiff as "net cost" for expenses incurred by plaintiff in the performance of the work.

4. All of the aforedescribed contracts between plaintiff and defendant were prepared and drawn by Sargent & Lundy, an engineering firm employed by the defendant as its engineers for the construction of the aforesaid extension to defendant's generating station. The contracts were thereupon submitted to the plaintiff for execution.

5. The contract identified as K-814 contains the following provision:

> "(15) It is mutually agreed that the 'Net Cost' of the WORK shall include all expenses incurred by Contractor which are directly chargeable to the WORK, and that said Net Cost of the WORK shall, without restricting the generality of the foregoing include the following items: • • •
>
> "(h) Amounts required by any Federal, State or local taxes applicable to the WORK, including old age benefits and unemployment taxes • • •".

The contract identified as K-825 contains an identical provision.

The contract identified as K-851, which is a firm unit price contract, does not contain the aforequoted provision, and plaintiff seeks no recovery for State of Indiana Gross Income Tax under Contract K-851 for the unit prices paid by dependant; but plaintiff does seek recovery for the Indiana Gross Income Tax upon monies paid plaintiff as cost for extra work done under the Extra Work provision of contract K-851. The provision of Contract K-851 providing for extra work requested by the defendant on a "Cost Plus" basis is as follows:

> " 'COST PLUS' Basis on which Bidder will perform extra work on old steel authorized by Purchaser and not covered by the unit prices. This should be based on the cost of labor, material, taxes and insurance; plus a percentage, which percentage shall include general superintendent, field office overhead, main office overhead, use of hand tools and profit. Percentage (as defined herein) is * * *."

6. After the execution of contract K-814 and the commencement by plaintiff of the work thereunder, the plaintiff sent to defendant invoices or bills, dated October 30, 1948, November 16, 1948 and November 30, 1948, respectively, for work performed by plaintiff up to such dates, each of which bills included for payment to the plaintiff as an item of its cost the State of Indiana Gross Income Tax applicable to the monies for which payment was requested by plaintiff in performing the work. Such bills, in accordance with the defendant's prescribed practice, were mailed by plaintiff to defendant at Michigan City, Indiana, the site of the work, where they were checked, and then forwarded by defendant to the office in Chicago, Illinois of Sargent & Lundy, defendant's engineers. At Sargent & Lundy's office the bills aforedescribed were

checked and then certified for payment by Sargent & Lundy. Such certification included the State of Indiana Gross Income Tax as billed by plaintiff. These bills, so certified, were then mailed by Sargent & Lundy to defendant's principal office. In the purchasing department of the defendant, that part of the afore identified bills which pertained to the State of Indiana Gross Income Tax was stricken out in pen and ink. Thereafter the plaintiff, from time to time, billed the defendant on separate vouchers or bills for the Indiana Gross Income Tax plaintiff was required to and which it did pay. Upon completion of the work under the contracts, plaintiff mailed defendant a voucher or bill summarizing all of the State of Indiana Gross Income taxes which plaintiff had been required to and did pay. The plaintiff never withdrew or waived its claim against the defendant for the payment of such taxes.

7. For some time prior to the time that plaintiff made its bids to do the "WORK" provided for in the contracts involved in this action and up to the time the contracts here in question were executed between plaintiff and defendant, the plaintiff, as a contractor, was having business dealing with the aforesaid firm of Sargent & Lundy, in that plaintiff was performing construction work in the State of Indiana for Chicago District Electric Generating Corporation, which was commonly called the "State-line" job. Sargent & Lundy were the engineers for the Chicago District Electric Generating Corporation on the "State-line" job acting in the same capacity as they did for the defendant in the construction of the aforedescribed extension of its generating station on Lake Michigan, near Michigan City, Indiana. On this "State-line" job, the plaintiff billed for and was paid as part of its costs the Indiana Gross Income Tax on all cost work.

8. Paragraph 19 of Contracts K-814 and K-825 enumerate the items of overhead which plaintiff therein agreed

to furnish without charge other than the total fixed charge provided in paragraph 14. The Indiana Gross Income Tax is not included in items of overhead specified in paragraph 19.

9. The State of Indiana Gross Income taxes which the plaintiff seeks to recover in this trial are those that plaintiff paid upon the monies the defendant paid plaintiff as the "Net Costs" of the Work. The "Net Costs" are the expenses plaintiff actually incurred in performing the Work that are directly chargeable thereto. The defendant repaid the plaintiff these expenses and the plaintiff was required to pay the State of Indiana Gross Income Tax in the amount of $31,529.55 on the monies plaintiff received from defendant in payment of such expenses.

10. At the time in question there was in full force and effect Regulation 404 of the official regulations promulgated by the Gross Income Tax Division of the State of Indiana, which regulation is as follows, to-wit:

> Reg. 404. Passing the Tax on.—Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding of such tax to such selling price or charges must be entirely a matter of contractual agreement between the buyer and the seller, and the Department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and will look only to the taxpayer for the tax upon his total gross receipts.
>
> Since taxpayers are not made the agents of the State to collect gross income tax, any amount added as the tax and collected by a taxpayer must be considered as an additional price received, and will be a part of the gross receipts of a taxpayer and must be reported as taxable income.

Conclusions of Law.

1. This Court has jurisdiction of the parties and the subject matter on the basis of diversity of citizenship.

2. If there be any doubt or uncertainty concerning the written provisions of the contracts involved in this action as to whether the State of Indiana Gross Income Tax was included within the meaning of the word "taxes" which the plaintiff was to be paid as part of the cost of the Work, the tax provisions must be construed most strongly against the defendant because the defendant, through its engineers, Sargent & Lundy, prepared the contracts and employed the words used concerning taxes.

3. The provision of paragraph 15(h) of Contracts K-814 and K-825 apply to all expenses incurred by plaintiff which were directly chargeable to the Work under those contracts and Extra Order No. 1 under Contract K-825.

4. The word "taxes" in the provision of Contract K-851 providing for payment to the plaintiff for extra work on a "Cost Plus" basis includes any taxes required to be paid by plaintiff on the monies defendant paid plaintiff as the cost of such extra work and does not include the percentage provided for and paid plaintiff for such extra work.

5. As the contracts in question provide that the defendant shall pay the expenses incurred by plaintiff that are directly chargeable to the Work, the defendant was to reimburse the plaintiff for such expenses. That construction which is most equitable should if possible be given to the disputed tax provisions of the contracts. It would be inequitable to construe the disputed tax provisions of the contracts so as to require the plaintiff to bear the obligations of the State of Indiana Gross Income Tax on monies which defendant paid plaintiff to reimburse plaintiff for expenses actually incurred in defendant's behalf.

6. The State of Indiana Gross Income taxes in the total amount of $31,529.55 which the plaintiff paid on monies received from the defendant as net costs for expenses incurred by plaintiff are State taxes applicable to the WORK, and under the provisions of the contracts in question the plaintiff is entitled to payment from the defendant of such State of Indiana Gross Income taxes as part of plaintiff's net costs of the WORK.

7. The plaintiff is entitled to judgment against the defendant in the amount of $31,529.55 and plaintiff's costs of this action.

JUDGMENT.

The above entitled action having come on for trial before this Court without a jury, the plaintiff appearing in person and by its attorneys, Nash, Ahern & McNally, and Martin J. Nally of Chicago, Illinois, and the defendant appearing in person and by its attorneys, Friedrich, Petrie and Tweedle, and Edwin H. Friedrich of Hammond, Indiana, and this Court having heard all of the evidence, testimony and proofs adduced upon the trial and having filed its Findings of Fact and Conclusions of Law with Order for judgment; Now, pursuant thereto it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff, Herlihy Mid-Continent Company, have and recover judgment against the defendant, Northern Indiana Public Service Company, in the sum of Thirty-one Thousand Five Hundred Twenty-nine Dollars and Fifty-five Cents ($31,529.55), together with costs of this action to be taxed by the Clerk of this Court.

Enter:

LUTHER M. SWYGERT,
Judge.

Hammond, Indiana.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, July 23, 1957.

Before

Hon. F. RYAN DUFFY, Chief Judge,
Hon. PHILIP J. FINNEGAN, Circuit Judge,
Hon. WALTER C. LINDLEY, Circuit Judge.

HERLIHY MID-CONTINENT COMPANY, *Plaintiff-Appellee*, vs. NORTHERN INDIANA PUBLIC SERVICE COMPANY, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 11922.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,
Respondent,
(Plaintiff-Appellee).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,
Respondent,
(Plaintiff-Appellee).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits that petitioner has failed to advance any special and important reasons why this Court should grant the writ. The Court of Appeals did not decide an important state question, nor sanction any departure from the accepted and usual course of judicial proceedings.

The Questions Petitioner Presents for Review.

Contrary to petitioner's assertion, the judgment is not *based* on erroneously admitted evidence. The trial judge, hearing the case without a jury, admitted some evidence concerning other contracts. The Court of Appeals held such evidence was *res inter alios* and that the trial court was in error in allowing it to be introduced, but concluded there was sufficient competent evidence to sustain the

decision of the trial court and affirmed the judgment. It is perfectly clear from the Findings of Fact and Conclusions of Law of the trial judge and the opinion of the Court of Appeals that the judgment is not based on the erroneously admitted evidence, but upon a construction of the language of the contracts between the parties.

The second question presented for review by petitioner is that the Court of Appeals construed the Indiana Gross Income Tax "as a sort of a privilege tax in the nature of an occupation or sales tax." The Court of Appeals did not so construe the Indiana law, but unequivocally stated that "we are dealing with a privilege tax upon the receipt of gross income as distinguished from a tax on property. See *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307; *Gross Income Tax Division* v. *Strauss*, 226 Ind. 329, 79 N.E. 2d 103" (Pet., p. 25).

Contending that the Court of Appeals' holding is in direct conflict with an applicable decision of the Indiana Supreme Court, the petitioner cites *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138. All the Indiana Court decided in that case, pertinent to petitioner's contention, was under an oral *cost-plus* construction contract wherein, as the Court there pointed out, *costs* of the contractor were not defined, the Indiana Gross Income Tax would be treated as *overhead* of the contractor. The Court of Appeals in this case analyzed that decision and properly held it inapplicable to the facts in this case, because the parties here by the terms of their contracts included the Indiana Gross Income Tax within the scope of operating costs (Pet., p. 26).

The final question Petitioner presents for review is that the Court of Appeals overruled one of its own decisions as well as decisions of the Indiana courts. The de-

cisions petitioner refers to passed upon claims of lessors that their lessees were obligated to pay the lessors' Federal income taxes on rents received. The lease provisions involved in those cases are so unlike the contract terms in this case, the Court of Appeals, properly, did not see fit to discuss them in its opinion.

Restatement of the Case.

Omissions and inaccuracies in petitioner's Statement of the Case make it advisable to set forth the following facts.

The respondent sought and recovered only the Indiana Gross Income taxes it paid on the moneys respondent received from the petitioner in reimbursement of costs respondent actually expended for petitioner in performing the contracts (Fdg. 9, Pet., p. 33).

All of the contracts between respondent and petitioner were prepared and drawn by an engineering firm employed by the petitioner, pursuant to a written agreement between petitioner and the engineering firm. In accordance therewith, the engineering firm prepared the contracts, the drawings and specifications, and issued certificates for payments to the respondent as the contractor. The contracts between petitioner and respondent specifically provided that this engineering firm should interpret the contracts (App. 3, 10, 29, 44, 62, 71, 76, 20).

In the provision requiring the petitioner to pay respondent as part of the latter's costs the amounts required by any Federal, State or local taxes applicable to the Work, the word "Work" designedly begins with a capital W. The term "Work" is defined in the contracts and as defined is all embracive, meaning, as the Court of Appeals found, the entire performance of the contracts (App. 20; Pet., pgs. 25, 26).

The contracts defined respondent's *overhead*, as well as the costs for which respondent would be reimbursed, which costs as defined expressly included any Federal, state or local taxes applicable to the "Work". The paragraph of the contracts defining respondent's *overhead*, for which it would not be reimbursed, did not include the Indiana Gross Income Tax or any language to that effect (Fdg. 8, Pet., pgs. 32, 33).

There were numerous contracts entered into by petitioner with others to supply machinery and equipment for the same construction job. These contracts with manufacturers were printed and provided generally for the payment of taxes by the petitioner. Insertions or notations, at petitioner's direction, were made by the engineering firm on the contracts with the manufacturers to exclude payment by petitioner of the Indiana Gross Income Tax (App. 91-101). No insertions or notations of any kind were ever made on the contracts between respondent and petitioner to exclude the Indiana Gross Income Tax (App. 102, 103; Pet.'s Exs. A, B, C and D; App. 10-47).

A partner of the engineering firm employed by petitioner which drew the contracts in question between petitioner and respondent testified that at the time the contracts were drafted and executed by petitioner and respondent he knew that there was an Indiana Gross Income Tax and that there was not any other State of Indiana tax that he knew of that respondent might be liable for in performing the contracts (App. 91). The president of petitioner, who personally read and signed the contracts on behalf of the petitioner, likewise testified he was conscious of the Indiana Gross Income Tax when he signed the contracts, and he in effect admitted that he knew of no Indiana tax other than Indiana's gross income tax which could come within the meaning of the words "state

taxes applicable to the work" (App. 286-289), which were the taxes petitioner agreed to pay respondent as part of the costs.

After construction was commenced by respondent, it sent bills or invoices monthly. Initially, these invoices included a charge for the Indiana Gross Income Tax. These invoices which included such tax charges were sent to the petitioner at the site of construction, where they were examined and tentatively approved by the petitioner. They were then forwarded by the petitioner to its engineering firm, which was expressly authorized in writing by petitioner to interpret the contracts between it and respondent. The engineering firm checked the invoices and certified them for payment, including the Indiana Gross Income taxes therein charged. So certified by the engineering firm, the invoices were sent to the principal office of the petitioner, where, in the purchasing department, the items for the Indiana Gross Income Tax were stricken out in pen and ink. Petitioner would not pay any bill which included among undisputed items an item it disputed (App. 218, 219, 220, 261; Fdg. 6, Pet., pgs. 31, 32).

The alleged conversations employees of petitioner testified they had with the president of the respondent, who died shortly before the trial, which are detailed at pages 7 and 9 of the petition, were refuted by a certified public accountant who at the time of the alleged conversations employed by the respondent (App. 154-156). Moreover, the correspondence that passed between the petitioner and the respondent and their lawyers, upon the payment of the last invoice of the respondent (accepted by agreement as being without prejudice to respondent's claim for the Indiana Gross Income taxes) conclusively belies

the alleged conversations with which petitioner unfairly burdened this Court in its petition (Respondent's Exs. 16, 17, 18; App. 249-253). Furthermore, in its answer in the trial court, petitioner did not plead that the respondent had waived its claim (App. 1). The trial judge found that the respondent never withdrew or waived its claim against the petitioner for the payment of the taxes (Fdg. 6, Pet., p. 32), and the Court of Appeals in its opinion refused, "after examination of the entire record," to disturb that finding (Pet., p. 26).

Regulation 404 issued under the Indiana Gross Income Tax Law authorized shifting the burden of the tax from the respondent to the petitioner by contractual agreement (Fdg. 10, Pet., pgs. 33, 24, 25).

ARGUMENT.

The Court of Appeals did not sanction any departure from the accepted and usual course of judicial proceedings.

There was no departure in this case from the accepted and usual course of judicial proceedings. The judgment is not based upon the theory that the Indiana Gross Income Tax is a tax upon the work under contracts, as petitioner contends. In its opinion, the Court of Appeals expressly stated, "We are dealing with a privilege tax upon the receipt of gross income" (Pet., p. 25).

The courts below construed *the tax provisions of the contracts,* not the Indiana Gross Income Tax law, as requiring the petitioner to repay the respondent the Indiana Gross Income Tax imposed upon the receipt by respondent of the costs it advanced in petitioner's behalf in the performance of the contracts. The Indiana Gross Income Tax Law imposed the tax upon "all funds received for the performance of contracts" (Burns Ind. Stats., Sec. 64-2603). It is now, and has been throughout this litigation, the theory of the petitioner that the respondent should be reimbursed for the costs expended in petitioner's behalf, *less the tax,* despite the provisions of the contracts. Petitioner seeks to defend that position in this Court, yet does not even challenge or dispute the Court of Appeals' reasoned interpretation of the meaning of the tax provisions of the contracts between the parties.

The Court of Appeals, as well as the trial court, held that under the provisions of the contracts petitioner had agreed to reimburse respondent for the taxes imposed upon the reimbursed costs and that this was authorized by

Regulation 404 issued under the Indiana Gross Income Tax Law, which allows shifting the tax from the recipient of the gross income to the party who pays it (Fdg. 10, Pet., pgs. 33, 24, 25). A regulation of a department of a state government charged with the enforcement of a statute, has the force and effect of law (*Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 40 S. Ct. 155, 64 L. Ed. 297, 302).

In a further effort to convince this Court there was a departure from the accepted and usual course of judicial proceedings, the petitioner contends that the judgment is *based* on erroneously admitted evidence (Pet., p. 3) and that, in determining the litigation adversely to the petitioner, the trial court relied on other contracts respondent had with Chicago District Electric Generating Corporation (Pet., p. 11). This is not true.

While conceding that the Court of Appeals held that the admission of such evidence was erroneous, the petitioner seeks this Court's review upon the ground that the admission of the evidence was *reversible* error. Petitioner's wholly unwarranted assertion that the trial court *based* its judgment upon the erroneously admitted evidence of respondent's contracts with Chicago District Electric Generating Corporation is belied by a reading of all the Findings of Fact (Pet., pgs. 29-33) and particularly by the Conclusions of Law (Pet., pgs. 34, 35). Findings 9 and 10 (Pet., p. 33) and Conclusion of Law 6 (Pet., p. 35) clearly show that the trial court based its judgment on a construction on the provisions of the contracts. The opinion of the Court of Appeals manifests that it affirmed the judgment for that reason (Pet., pgs. 25, 26).

The fact is, demonstrated by the record, the erroneously admitted evidence was not offered and received as *binding*

upon the petitioner but merely to show what was in the mind of respondent when the contracts between it and the petitioner were executed. The same engineering firm which was the agent of petitioner in drafting, supervising the performance of and in certifying payments under the contracts between petitioner and respondent acted in a similar capacity under current net-costs' contracts between respondent and Chicago District Electric Generating Corporation, whereunder respondent was being paid the Indiana Gross Income Tax imposed on its reimbursed costs. Upon the trial of this case, when counsel for respondent offered the evidence concerning the contracts with Chicago District Electric Generating Corporation, because of the dual position of petitioner's engineering firm, he repeatedly stated that such evidence was not offered *as binding upon petitioner* but was introduced in order that the trial judge might place himself in the situation of the parties to determine what was in the mind of respondent with reference to the tax provisions of the contracts between it and petitioner when the contracts were executed (App. 84, 88). Under such circumstances, it is difficult to understand petitioner's repeated assertion that the trial judge based the judgment upon such evidence in view of respondent's expressed position that the evidence was not binding upon the petitioner.

It is significant that in his findings the trial judge merely recited the erroneously admitted evidence. He made no conclusions of ultimate fact or of law therefrom (Pet., pgs. 29-35), his determination and judgment being based upon a construction of the contracts between petitioner and respondent.

Stripped of its obviously designed circumventions, in reality, the proposition petitioner urges is that if er-

roneously admitted evidence is recited in a finding of fact, *ipso facto*, the error in admitting such evidence is reversible error. Rejection of that proposition by the Court of Appeals is the basis of petitioner's claim that it sanctioned a departure in this case from the accepted and usual course of judicial proceedings.

Where a case is tried before the court without a jury and in his findings of fact the trial judge recites erroneously admitted evidence, the error is not reversible if, as here, there is other competent evidence to sustain the judgment (Rule 61, Federal Rules of Civil Procedure; *Mammoth Mining Co.* v. *Salt Lake Foundry & Machine Co.*, 151 U.S. 447, 14 S. Ct. 384; *Ruckman* v. *Cory*, 129 U. S. 387, 9 S. Ct. 316; *Parker* v. *Title & Trust Company*, 233 F. 2d 505, 513; *Particelli* v. *Commissioner of Internal Revenue*, 212 F. 2d 498, 502; *Thompson* v. *Baltimore & O. R. Co.*, 155 F. 2d 767, 771; *Bommarito* v. *Southern Canning Co.*, 209 F. 2d 56, 61; *Green* v. *Dingman*, 234 F. 2d 547, 552, 553).

The authorities cited by the petitioner as being persuasive that the inclusion of erroneously admitted evidence in the finding makes the error reversible, have no application. In *City of Chicago* v. *Greer*, 76 U.S. 726, 19 L. Ed. 769, the trial was by jury and evidence of other contracts was offered but excluded on the trial. The opinion of this Court upheld that ruling. In *Builders Steel Company* v. *C. I. R.*, 179 F. 2d 377, a review of a decision of the Tax Court, the issue was whether compensation paid to corporate officers was reasonable. The Tax Court had refused to admit competent evidence as to the reasonableness and worth of the officers' services. The reversal by the Court of Appeals was for *exclusion* of competent and material evidence upon the very issue to be determined. Significantly, the Court of Appeals in

that very case said it was virtually impossible in the trial of a non-jury case for the trial judge to commit reversible error by receiving incompetent evidence. The remaining case upon which petitioner relies is *Freightways, Inc.* v. *Stafford*, 217 F. 2d 831. In that case the judgment of the trial court was reversed and the cause remanded because the findings of fact were in irreconcilable conflict on material issues and there was no substantial evidence to sustain the judgment.

The Court of Appeals gave due consideration to the position the petitioner advances in this Court and cited numerous cases upholding its determination that the error in the admission of the evidence concerning other contracts was not reversible (Pet., p. 28).

The Decision of the Court of Appeals is not in conflict with applicable Indiana law.

In its final endeavor to have this Court review the record in this case, petitioner repeats its declaration that, "The Court of Appeals construes the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax". The Court of Appeals in its opinion unequivocally stated that the tax is a privilege tax upon the receipt of gross income (Pet., p. 25); which is in complete accord with the decision of this Court in *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, 58 S. Ct. 913, rather that "in irreconcilable conflict," as petitioner contends.

Petitioner confuses construction of the Indiana Gross Income Tax law with the Court of Appeals construction of the contracts. In such confusion, petitioner omits what the Court of Appeals specifically pointed out, that the term "Work" in the phrase "any state taxes applicable

to the Work" was so defined in other provisions of the contracts as to mean the entire performance of the construction contracts. Consequently, the Court of Appeals concluded that the phrase "any state taxes applicable to the Work" meant any state tax which was required to be borne by the respondent in connection with or as a result of the performance of the entire contracts. As the respondent was required to advance the costs of construction, which upon reimbursement were subjected to taxation under the Indiana Gross Income Tax Law, the tax upon the reimbursed costs was required to be borne in connection with and as a result of the performance of the contracts.

The Court of Appeals did not misconstrue the Indiana Gross Income Tax Law. Petitioner misconstrues the Court's opinion. In determining that the Indiana Gross Income Tax was a tax applicable to the performance of the entire contracts *under the contract provisions*, the Court of Appeals did not thereby hold that the Indiana Gross Income Tax was a tax imposed upon work (in the ordinary sense). Petitioner argues as if the tax clause in the contracts provided that the petitioner would only reimburse the respondent for any state tax imposed upon the work done under the contract, but petitioner, whose agent drew the contracts, therein agreed to reimburse respondent for any state tax *applicable* to the entire performance of the contracts. Applicable means relevant; and it is perfectly clear that the taxes paid by respondent were related to the performance by it of the contracts. If the respondent had not performed the contracts, it would not have had to pay the tax. Manifestly, then, the taxes in question were applicable or relevant to the performance of the contracts.

The second contention of petitioner that the Court of Appeals decided important state questions in conflict with Indiana law is based on petitioner's misconstruction of the opinion in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138. While conceding that the Indiana court in its opinion in that case pointed out that it was dealing with an oral contract in which the contractor and the owner did *not* define costs, the petitioner gratuitously asserts *that* is a distinction without a difference, and concludes that the decision in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138, expressly declares the law of Indiana to be that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work and that a contract between private parties cannot change the nature of the tax. Of course, the Indiana tax is a direct tax upon the contractor and parties to a contract cannot change the *nature* of the tax. But the contractor and the owner for whom the contractor does construction can validly agree that the owner will repay the contractor the Indiana Gross Income Tax imposed upon the reimbursement of the contractor's costs. Regulation 404 issued by the Indiana Department of Revenue under the Indiana Gross Income Tax Law specifically permits such an agreement (Fdg. 10, Pet., p. 33), and the Courts of Indiana have repeatedly recognized that parties are perfectly free to contract contrary to existing law if their contract is not violative of public policy (*National Mill Supply Co.* v. *State*, 211 Ind. 243, 6 N.E. 2nd 543; *Lester* v. *Hinkle*, 90 Ind. App. 193, 153 N.E. 179; *Niederhaus* v. *Jackson, Receiver*, 79 Ind. App. 551, 137 N.E. 623, 624).

As the Court of Appeals expressly stated in its opinion, the holding in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138, can have no bearing in this case because the peti-

tioner and respondent included the tax within the scope of the costs for which respondent was to be reimbursed.

The final contention of petitioner is that the Court of Appeals ignored a rule that the burden of the payment of a tax is not shifted from the statutory taxpayer by contractural agreement except by express language and a clear and unmistakable intention to do so. While the decisions cited by the petitioner do not uphold the broad and emphatic statement of such a rule as petitioner declares it, more significant is the assumption by petitioner that the holdings of the cases it cites require that in order to shift a tax by contractual agreement the tax must be specifically named. Petitioner says, "There was no express promise by the petitioner to pay the Indiana Gross Income Tax. A search of the record will disclose that the tax is not mentioned in any of the contracts between the parties" (Pet., p. 17). Petitioner then proceeds to argue that "under these circumstances, the case of *Owen* v. *Fletcher Savings & Trust Building Co.*, 99 Ind. App. 365, 189 N.E. 173, is controlling" (Pet., p. 18). That Indiana case did not hold, directly or indirectly, that to shift a tax by contractual agreement the tax had to be specifically named, and the language of the opinion indicates the contrary. In that case, a lessor sought recovery from the lessee of Federal income taxes the lessor paid upon the rentals received under the lease. The clause upon which lessor relied provided the lessee would pay any Federal, State and local taxes assessed on the real estate demised or upon the *right* of the lessor to receive rentals under the lease. As appears from the portion of the Indiana court's opinion quoted in the petition for certiorari in this case, the Indiana court refused to expand the meaning of the clause "assessed upon the right of the lessor to receive the rentals" to include the payment by

the lessee of taxes upon the personal income of the lessor (Pet., p. 19).

The remaining case cited by petitioner is *Illinois Central* v. *Indianapolis Union P. Co.*, 6 F. 2d 830, which petitioner asserts the Court of Appeals, by silence, overruled. In that case, the Court of Appeals of the 7th Cir. had before it the claim of a lessor for payment by the lessee of Federal income taxes. The lessor relied upon a provision of the lease that the lessee would pay lessor all expenses growing out of maintenance, operation, renewal and replacement of each railroad system, including taxes. The Court of Appeals concluded that there were no words or phrases from which it might be *inferred* that the tenant railroad undertook to pay any tax assessed upon the rent itself once it came into the hands of the lessor.

Such cases involving claims for recovery of Federal Income taxes have no application to this case. Unlike the Indiana Gross Income Tax, the Federal income tax is not a privilege but a tax on net income derived from all sources (*Keasby & Mattison Co.* v. *Rothensies* (C.C.A. Pa.), 133 F. 2d 895, 897; *Franklin* v. *Peterson, et al.*, 87 Cal. App. 2d 727, 197 P. 2d 788, 792; *Davis* v. *Ogden City; et al.*, 117 Utah 315, 215 P. 2d 616; *Cooley, The Law of Taxation*, Fourth Ed., 1924, Vol. 4, Sec. 1742, p. 3477). "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden on the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise" (*United States Glue Co.* v. *Town of*

Oak Creek, 247 U. S. 321, 38 S. Ct. 449, 62 L. Ed. 1135, 1141).

CONCLUSION.

It is respectfully submitted it clearly appears from the record before this Court that the Court of Appeals did not sanction a departure from the accepted and usual course of judicial proceedings and that it did not decide any state questions, important or otherwise, in conflict with applicable Indiana law. The Petition for a Writ of Certiorari was improvidently filed and should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Petitioner
(Defendant-Appellant)

vs.

HERLIHY MID-CONTINENT COMPANY,

Respondent
(Plaintiff-Appellee).

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

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NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Petitioner
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,

Respondent
(Plaintiff-Appellee).

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Respondent's brief in opposition to the petition for writ of certiorari fails to show any distinction of legal significance between the instant case and the authorities relied on by petitioner. Indeed, there is none. Otherwise, respondent would certainly cite applicable cases to support the judgment.

RESTATEMENT OF THE CASE.

The Restatement of the Case by respondent (Respondent's Brief, 3-6) supplies no omissions and corrects no inaccuracies in petitioner's statement. The inaccuracies are in the restatement itself. An example is respondent's claim that the statements[1] of its president were refuted by the testimony of respondent's certified public accountant (Respondent's Brief 5, Transcript 154-156). The record shows that the certified public accountant was never present when said declarations of the respondent's president were made (Transcript 154-156; 162).

A like inaccurate correction is the claim that the Indiana Gross Income Tax is the only state tax to which the contracts in question could have referred (Respondent's Brief, 4). This clearly ignores the fact that petitioner paid respondent's unemployment compensation and workmen's compensation tax, which were state taxes expressly mentioned in the contracts, and the fact that petitioner did not pay respondent's federal income tax any more than its state gross income tax, neither of which were mentioned in the contracts (Petition 5, Transcript 15-16) and neither of which were applicable to the work. The specious nature of the restatement is perhaps best proved by the failure of the respondent to rely on any of the matters therein in its argument.

---

1. The statements of respondent's president were: "I know what the Indiana Gross Income Tax is, strike it off the bills, we will not bill them for it" (Petition 7, Transcript 181 and 182), and his reply to petitioner's purchasing agent's statement that there would be no income tax "that's right, but something has come up and I have changed my mind" (Petition 9, Transcript 213).

ARGUMENT.

1. The Court of Appeals has sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The merit of this proposition is well shown by the lack of substance in respondent's answer. First, respondent claims that the improper evidence was not offered to bind the petitioner (Respondent's Brief, 8-9). This attempt to seek the benefit of the prejudicial effect of inadmissible evidence and then deny responsibility for its admission is in itself a tacit admission of the lack of any legal theory on which the contracts of respondent with a stranger could afford an evidentiary basis to determine the rights of the instant parties under their contracts. Respondent fails to cite a single case to sustain the patently absurd proposition that it is a usual course of judicial proceedings to evade responsibility for admission of improper evidence and the prejudicial effect thereof by the statement that the evidence is not "binding."

Second, the respondent seeks to answer the petition by reliance on cases which cite well established rules that even though improper evidence is admitted a reversal is not required unless such evidence is prejudicial and, further, that in a trial without a jury the court is presumed to ignore incompetent evidence (Respondent's Brief, 10). However, in none of the cases cited by respondent did a trial court make a material finding of fact on incompetent evidence which was the only evidence in the record to support such a finding. Respondent does not challenge the statement that a careful search of the record will disclose

that there is no other evidence to support Finding of Fact No. 7 (Petition, 14). It is likewise unchallenged that a careful search of the record will fail to disclose a scintilla of evidence that petitioner had any notice or knowledge of either the execution or existence of respondent's contract with Chicago District Electric Generating Corporation, a stranger (Petition, 11). Where the sole issue in the litigation was whether petitioner was responsible under construction contracts for the construction of a generating station in Indiana to reimburse respondent for Indiana Gross Income Tax, evidence relied upon by the court that respondent had been paid the Indiana Gross Income Tax under a construction contract for the construction of a generating station in Indiana by a stranger, Chicago District Electric Generating Corporation, was clearly prejudicial.

It is difficult to conceive how the presumption that the trial court ignored this incompetent evidence could be more conclusively overcome than by its own finding of fact thereon (Petition, 14, 32; Transcript 331). There is no answer in the brief of the respondent to the fact that the very cases on which the Court of Appeals relied to affirm the judgment of the trial court show it to be reversible error for a trial court to give weight to incompetent evidence (Petition, 13, 23; 245 F. 2d 444). It is a manifest departure from the accepted and usual course of judicial proceeding to refuse relief where the presumption that the trial court has ignored incompetent evidence is overcome by its own findings, *Freightways, Inc.* v. *Stafford*, 8 Cir. (1955) 217 F. 2d 831, 837, particularly when the evidence was so clearly inadmissible and prejudicial, *City of Chicago* v. *Greer* (1870), 76 U. S. 726; 19 L. Ed. 769; *Shell Petroleum Corp.* v. *Earnest* (1933), 97 Ind. App. 483, 187 N. E. 211; *Wacker* v. *Essex* (1918), 67 Ind. App. 584, 119 N. E. 466.

2. The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with applicable state law.

Respondent has not challenged the proposition that the law of Indiana, including the judicial construction thereof, defining the nature and extent of the Indiana Gross Income Tax and the construction of the contracts between the parties is controlling. *Great Northern R. Co.* v. *Sunburst Oil Refining Co.* (1932), 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360; *Evans* v. *Koons* (1894), 10 Ind. App. 600, 38 N. E. 55; *Douglass* v. *The County of Pike* (1880), 101 U. S. 677, 25 L. Ed. 968.

(i) It is well established and unquestioned that the Indiana Gross Income Tax is not a tax upon work or performance of contracts nor is it an occupation or sales tax, nor is it a tax upon the transaction of business; it is simply a privilege tax upon the receipt of gross income. *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365; *Miles* v. *Dept. of Treasury* (1935), 209 Ind. 172, 199 N. E. 372; *Gross Income Tax Div.* v. *Strauss* (1948), 226 Ind. 329, 79 N. E. (2d) 103.

The Court of Appeals correctly said "it is equally clear that we are dealing with a privilege tax upon the receipt of gross income" (245 Fed. 2d at page 443, Petition 25), but forthwith proceeded to disregard the rule. It is difficult to follow respondent's argument that the Court of Appeals did not construe the tax as a sort of occupation or sales tax attributable not to the receipt of gross income but to the work in light of its conclusion that:

> "Therefore 'state taxes • • • applicable to the Work • • •' quite clearly seem to have been intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plain-

tiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, *we conclude that the tax was directly attributable to and in fact, a part of the work,* namely, the entire performance of the contracts." (245 F. 2d at page 443, Petition at pages 15 and 25, emphasis added.)

The argument at page 12 of respondent's brief that the opinion relates to a construction of the contracts rather than of the tax is thus answered by the opinion itself.

(ii) *Mann* v. *Schnarr* (1950), 228 Ind. 654, 95 N. E. (2d) 138, holds that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work. The only answer by respondent is at page 13 of its brief where the claim is made that the case can have no bearing since the parties here included the tax in respondent's costs. This answer is on the unsound premise that private parties can by contract change the nature of a tax passed by a state legislature and the construction of that tax made by this court in *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, and by the Supreme Court of Indiana in *Mann* v. *Schnarr* (1950), 228 Ind. 654, 95 N. E. (2d) 138. Argument by parties to this litigation cannot alter the fact that the Supreme Court of Indiana has decided beyond theory or speculation that the Indiana Gross Income Tax is not an operating cost.

(iii) The Court of Appeals has ignored a well established and important rule of law that the burden of the payment of a tax is not shifted from the statutory taxpayer by contractual agreement except by express language and a clear and unmistakable intention to so shift the burden.

It is claimed that this is not a fair statement of the rule (Respondent's Brief, 14). That question is determined in *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365 at 381, 189 N. E. 173 at 179:

> "Nowhere is an income tax expressly mentioned or referred to. If the parties contemplated or intended that the lessee should pay the income tax assessed against the lessor on rent received by her under the lease, such a condition could, and evidently would have been inserted in the lease by the use of a few simple, plain words, thereby eliminating any uncertainty. • • • To expand the meaning of the clause 'or which may be assessed upon the right of the lessor to receive the rentals hereunder during this lease' to include the payment of taxes upon the personal income of the lessor by the lessee, would require us to ignore the rules of construction which have been followed by the courts of other jurisdictions under like circumstances."

Respondent argues at page 15 of its brief that the cases of *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365, 189 N. E. 173, and *Illinois Central* v. *Indianapolis Union P. Co.*, (7 Cir., 1925), 6 F. (2d) 830, are not applicable since they involved Federal Income Taxes. *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365 at 375, 189 N. E. 173 at 177, answers this argument where it is said:

> "An income tax is distinguished from other forms of taxation in that it is not levied upon property nor upon the operation of a trade or business or subjects employed therein, nor upon the practice of a profession, the pursuit of a trade or calling, but upon the acquisitions of a tax payer arising from one or more of these sources or from all combined. It is not a tax on property and a tax on property does not embrace income. '*An income tax is an assessment upon the*

income of the person and not upon any particular property from which that income is derived.' ". (Emphasis added.)

It is the fact, that both taxes are income taxes, that is of legal significance, and not the fact that one is passed by the Congress of the United States and the other by the Legislature of the State of Indiana, or that one is a gross tax and the other is a net tax. It is thus abundantly clear that the Indiana Gross Income Tax is no more collectible by the respondent from the petitioner than is the Federal Income Tax which is admittedly uncollectible under the contracts in question.

The error in respondent's position arises from an attempt to interchange the phrase "performance of contracts" for the phrase "burden on interstate commerce." It is on this untenable premise that respondent would argue the applicability of the case of *United States Glue Company* v. *Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135. The question of shifting the burden for payment of a tax was not involved in that case in any way nor is there anything in the decision which is contrary to the well settled rule of law that the burden of payment of a tax is not shifted except by an express agreement.

Conclusion.

The Court of Appeals for the Seventh Circuit having sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of the Supreme Court of the United States, and having decided important state questions in conflict with the applicable state law, and the respondent having failed to give a meritorious answer to the petition herein and having failed to show authority in support of said decision, petitioner respectfully urges that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that, upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

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